SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 121

L. L. MOORE,

Petitioner,

vs.

MEAD'S FINE BREAD COMPANY, A CORPORATION,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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Opinions Below

The opinion of the Court of Appeals for the Tenth Circuit is reported at 208 F(2) 777.

Jurisdiction

Jurisdiction of this Court is invoked under Section 1254 (1); Title 28 U. S. C.

Statutes Involved

Section 2(a) of the Clayton Act (Title 15 U.S.C.A. Section 13(a)) is as follows:

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either

directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration

of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned." 49 Stat. 1526.

Section 2(b) of the Clayton Act (Title 15 U. S. C. A. Section 13(b); 49 Stat. 1526) is as follows:

> "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price of services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

Section 13a, Title 15 U. S. C. A. (49 Stat. 1528) is as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a com-

petitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000.00 or imprisoned not more than one year, or both."

Section 4 of the Clayton Act (Title 15 U. S. C. A. Section 15; 38 Stat. 731) provides as follows:

"That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee."

Questions Presented

Part A

The petitioner predicates his action upon Sections 13(a) and 13a of Title 15 U. S. C. A. (49 Stat. 1526 and 1528) and under such sections the following questions are raised:

(1) May Section 13(a) be extended to include intrastate activities having no adverse affect upon interstate commerce or having only an insubstantial affect thereon?

(2) May Section 13a be extended to include activities outside the flow of commerce between the states, and if so,

(3) May Section 13a be extended to include intrastate activities having no adverse affect upon interstate commerce or having only an insubstantial affect thereon?

(4) Did the Court of Appeals correctly determine, under the facts of this case, that the price cut in the

single town of Santa Rosa, New Mexico, did not in any substantial way adversely affect or threaten adverse affect to interstate commerce?

(5) Here the petitioner totally refused to compete with respondent or anyone else on any basis. The question, then, is presented: Are the Sections upon which petitioner bases his action available to a person who refuses to compete in an open and fair market?

(6) Was the boycott involved in this action a changed market condition affecting the market for or the marketability of respondent's goods within the fourth proviso of Section 13(a), Title 15 U. S. C. A.?

(7) Is the doctrine of the "law of the case" a limitation upon the power of a Court of Appeals to consider a matter previously before it but left open for determination at a later time?

Part B

(8) May the accused in a price discrimination action under Section 13(a) show justification for the sale of its products at a reduced price, where it appears that the sales at the reduced price were made in response to a boycott resulting in a destruction of its market?

(9) Did the Trial Court err in permitting the jury to take into consideration alleged losses during the time respondent was not engaged in commerce?

(10) Did the Trial Court err in permitting the jury to take into consideration loss of value of property, where the evidence conclusively shows a market value after the alleged wrongful act equal to the value before such act?

(11) Did the Trial Court err in permitting the jury to take into consideration alleged loss of profits, where the evidence failed to establish that the complaining party could have made a profit in the absence of the alleged wrongful act?

(12) Did the Trial Court err in permitting the jury to take into consideration an alleged loss of profits where the complaining party fails to furnish informa-

tion from which the jury could reasonably estimate the loss?

PART C

(13) Assuming that all other essential elements necessary to a recovery are present, did the Trial Court err in permitting a recovery in excess of nominal damages where the complaining party failed to show that he was actually injured as alleged by him?

(14) Did the Trial Court err in rendering judgment for petitioner in the amount of $72,000.00 trebled where the petitioner failed to establish his alleged loss or damage?

(15) Did the Trial Court err in allowing petitioner an attorney's fee in the amount of $11,400.00?

Statement of the Case

Respondent cannot accept petitioner's Statement because of inaccurate conclusions and omissions which give the Court an entirely erroneous picture of the factual situation and of the question which this Court, under the Writ of Certiorari, is required to pass on.

Succinctly the undisputed facts in this case are that the petitioner from some time in 1946 until February 28, 1950, was doing a purely local bakery business in the town of Santa Rosa, New Mexico, and the immediate surrounding area. R. 39, 40, 48, 214. The respondent is a New Mexico Corporation conducting in that State a bakery business with its plant at Clovis, New Mexico. At the time respondent first offered its bakery products to the retail grocery merchants in Santa Rosa on an unestablished date in January of 1948, it had not sold nor attempted to sell any of its goods in that town. On that date respondent started trucking its bread and other bakery products to Santa Rosa from its only plant in Clovis, New Mexico, to Santa Rosa, New Mexico, over a route entirely within that State. R. 47, 48, 74.

For a period of time prior to January 16, 1948, the respondent had sold a small percentage of its output in Farwell, Texas, but on January 16, 1948, it ceased any such sales until December 27, 1948 (R. 131), and hence from January 16, 1948, to December, 1948, respondent was not engaged in interstate commerce. R. 131. Its activities and sales during that period were purely local.

Either shortly before or after January 16, 1948, (The Record is not clear) the respondent, for the first time started trucking its bread and other bakery products from Clovis to Santa Rosa and its products were purchased by most, if not all, of the retail merchants in the town and was placed on their shelves in competition with the petitioner's goods and at the same price. R. 47, 76-77. The commodities of the two parties were sold in open and fair competition until September 3, 1948. R. 75, 82, 89.

Petitioner, according to his own testimony, concluded on the first day that respondent offered its products to the merchants in Santa Rosa, that there was not enough business for the two competitors and decided volantarily to move to another town in New Mexico. R. 76-77. Petitioner leased a building in Tucumcari in June (R. 76) and a month before he planned to move he informed his Santa Rosa landlord of his action. R. 76. The landlord, together with others, asked him what it would take to keep him in Santa Rosa and Mr. Moore replied that he didn't know of anything that they could do to keep him there; but when he was offered all of the business in town he decided to stay if the merchants "would support me one hundred per cent." R. 77. A petition was prepared and all "except one store signed the petition one hundred per cent." R. 76, 77. There is no doubt as to the intent of the petition or what was meant by "support me one hundred per cent", because the petitioner, Mr. Moore, testified that the merchants

had to "quit buying Mead's bread", "just buy his bread", so he "would not have any competition." R. 79, 80, 87.

Petitioner testified that two meetings were held in connection with the petition, one of which was held in a "little back room" to decide on what day the boycott would become effective—"get them all together so that it would all be effective on the same day." R. 86. At this meeting it was decided that the boycott would become effective on September 3, 1948. R. 80. This was approximately 7 months after respondent (Mead's) first offered its bakery products in the town of Santa Rosa.

The petitioner further testified that during this seven months period he considered Mead's competitive methods and practices fair in every respect. R. 75, 82, 89. He stated repeatedly that he could not *exist* with Mead's in the market with him. (R. 82, 84, 89), and emphatically stated that he had to have all of the business in Santa Rosa to "*exist*". R. 82, 89. He testified that with Mead's in the market with him on a fair basis his business was not profitable (R. 212) and that he could no "exist" if he had to compete with them or anyone else. R. 82. Having Mead's as a competitor on a fair basis forced him to the conclusion that he had only two alternatives remaining—"either close down or move out." R. 82, 84.

The boycott struck on September 3, 1948, and Mr. Moore testified that on that day all of the accounts Mead's had in Santa Rosa refused to buy Mead's products with the exception of Lillie's store. R. 80. He stated that he later heard that Jack's store continued to buy (R. 87, 90) but at page 93 of the Record he agreed that "Jack's" continued to be his customer, exclusively, until he closed his shop.

Mr. Corcorran, Vice-president of respondent, testified that on the day the boycott struck he went to Santa Rosa

and found that the merchants were refusing to purchase all of respondent's goods and that his efforts to persuade them to allow respondent to do business in the town were wholly unsuccessful. R. 170. Confronted with this he cut the price of bread only and only in Santa Rosa to 7 cents per pound. R. 171-172.

Mr. Moore testified that Mead's cut the price of *white bread only* and *only in the town of Santa Rosa* (R. 48, 97), that he lost no sales on any product, including bread, outside the town of Santa Rosa (R. 49) and lost no sales of any product other than bread in Santa Rosa. R. 69. He stated that his only complaint concerned bread sales in the town of Santa Rosa. R. 48, 97. After the price on bread was cut, Mead's regained a part of its old customers, but Mr. Moore agrees that the boycott continued to be at least four-tenths effective after the price of bread was raised by respondent on April 26, 1949, (R. 48) and until he closed his shop. R. 94. After the price was raised by respondent in Santa Rosa, Mr. Moore cut the price of bread in Tucumcari, New Mexico, where he and the respondent were also competitors. R. 214. Petitioner's products were never at any time removed from any store shelf and when he closed his bakery on February 28, 1950, Superior Baking Company took his place in the market. R. 175.

The Secretary-Treasurer of respondent testified that the total sales made across the State line during the entire period of the price cut was 1.7 per cent of respondent's total business during the term of such price cut. R. 216-217.

Petitioner then instituted this action in the District Court for treble damages. The District Court, without considering the question hereafter presented as to whether respondent should be considered within the meaning of the Robinson-Patman Act to have been in commerce so far as the action in Santa Rosa was concerned, held that its ac-

tion came within the fourth proviso clause of Section 13(a) of the Robinson-Patman Act and was therefore excluded. Petitioner appealed to the 10th Circuit and that Court, without considering the ground on which the District Court had ruled, affirmed (184 Fed. 2d 338) upon the ground that it appeared that the plaintiff was in *pari delicto*. This Court having decided in 340 U.S. 944, 71 S. Ct. 528, 95 L. Ed. 68, that *pari delicto* was not a defense to an action under the Anti Trust Act, granted certiorari, and in the same order, remanded it to the Circuit Court for further consideration. On reconsideration, a majority of the Court held that under the ruling of this Court a question of fact was presented and remanded the case for trial to the District Court (190 Fed. 2d 540). The trial resulted in a verdict of $19,000.00 for the petitioner, which the Court trebled, adding $11,500.00 as counsel fees. Petitioner appealed to the 10th Circuit on grounds including the basis of that Court's decision and on assignment of numerous errors of the trial court, each of which we believe was entirely sound.

The Circuit Court agreeing with us on our first point, and of course, found it unnecessary to pass upon any of the assignments of errors; although we believe that it or any other tribunal considering them would sustain each and all of them.

Petitioner sought and obtained a Writ of Certiorari from this Court, its petition being necessarily addressed only to the ruling of the Circuit Court that the petitioner was not entitled to recover. Nevertheless, petitioner, in his brief, asked the Court not only to reverse the Circuit, but to reinstate the judgment of the District Court. While we feel confident that this Court will reach the conclusion that the judgment of the Circuit Court was correct and will be affirmed, it is obvious that if it should reach a contrary

conclusion, it could not in justice reinstate the judgment of the District Court without considering and passing upon the assignments of error, each of which, as stated, we believe is well taken, or remanding the case to the Circuit Court for the purpose of that Court considering it. As we understand the rule, the question as to these assignments of error was not within the writ and would not ordinarily be considered by this Court; and that the ordinary procedure would be to remand it to the Circuit. Since the petitioner could not very well include them in his petition, and in case this Court should feel that under the circumstances it should consider and pass upon them, we have divided our argument into three parts, the first dealing with the right of petitioner to recover at all, the second, briefly outlining the specifications of error and, also briefly, the reasons we believe that each is well taken. The third part is placed at the latter part of the brief for the sake of brevity in order that the Court will have the benefit of the accumulated authorities, argument and facts having a bearing upon the points raised in determining the liability, if any at all, of respondent.

Unless otherwise noted, all emphasis through the argument is ours.

Summary of the Argument

I

1. Congressional power to regulate an intrastate activity is limited to those which in some way have a substantial effect upon interstate commerce; and the Court of Appeals correctly determined that under the factual situation of this case, the sales of bread by the respondent at a reduced price in the single town of Santa Rosa, New Mexico, did not burden or threaten a burden to interstate commerce.

2. The discrimination of which petitioner complains in-

volves wholly intrastate sales of bread baked in Clovis, New Mexico, and sold in Santa Rosa, New Mexico; but during the first 3 months and 24 days of the price cut respondent made no sales across a state line. The basis of the alleged discrimination being sales, and no sales of any character having been made in interstate commerce during this period no violation could possibly have occurred. Even under the petitioner's theory, no discrimination could have occurred because of the absence of sales across a state line. Even though during the latter part of the period of the price cut respondent started making a few sales in Farwell, Texas, Section 13a of Title 15 U.S.C.A. could not apply because such sales in Farwell were not at a lesser price than was charged elsewhere. Further Section 13(a) could not apply for the reason that it does not appear that the wholly intrastate sales in Santa Rosa in any way affected or threatened an adverse effect upon interstate commerce.

3. The complained of sales in Santa Rosa were in no way related to or affected interstate commerce. The petitioner's business was wholly local and is not shown to have been in any way connected with interstate commerce. The few sales made by respondent from its bakery in Clovis, New Mexico, in Farwell, Texas, were made to local retailers unrelated to New Mexico customers of either the respondent or petitioner. The alleged discriminatory sales in Santa Rosa were not dependent upon the Texas sales, and the aims of respondent were wholly local.

4. The absence of the usual evil consequences flowing from monopoly and control of commerce affirms the Circuit Court's conclusion that the boycott-price cut war was wholly local having no impact upon interstate commerce.

5. The decision of the Court of Appeals in this case in no way conflicts with any case cited by petitioner, and in

particular with Porto Rican American Tobacco Co. vs. American Tobacco Co., 30 F(2) 234, Cert. Den.; 279 U.S. 858; 49 S. Ct. 353; 73 L.Ed. 997; or Corn Products Refining Co. vs. F.T.C., 324 U.S. 726; 65 S. Ct. 961; 89 L.Ed. 1320, and other cases cited by respondent.

II

The mere fact that the stockholders of respondent lived in Texas and owned stock in other corporations engaged in a bakery business in Texas, and the fact that such corporations used the name "Meads" in a similar manner, is insufficient to justify a disregarding of the separate corporate entities and make one the instrumentality of the other.

III

The Court of Appeals, in its earlier opinions, left open the question of whether or not the complained of sales in the single town of Santa Rosa, New Mexico, affected interstate commerce. In any event the doctrine of the "law of the case" does not limit the power of a court to reconsider a matter previously determined by it.

IV

The purpose of the Sections upon which petitioner bases his action seeks to protect the public from the evils flowing from destruction of competition; however, the petitioner, being totally unwilling to compete with the respondent or anyone else on any basis is not a competitor that could be injured or destroyed within the provisions.

V

Section 13(a) of the Robinson-Patman Amendment provides that a price may be reduced when such reduction is

made in response to a changed condition "affecting the market for, or the marketability of the goods concerned." The petitioner having admitted that the respondent reduced the price of its bread in response to a boycott which destroyed its market and admitted that the boycott continued at all times and for 10 months after the price was raised, the act of the respondent in making the complained of sales was not a discrimination within the provisions of the Act.

Part B

ASSIGNMENTS OF ERROR BROUGHT FORWARD IN SUPPORT OF THE REVERSAL OF THIS CAUSE BY THE COURT OF APPEALS.

I Section 13(b), Title 15 USCA, provides that the person charged with a violation of Section 13(a) may avoid the penalties of the act by showing justification. The Trial Court erred in refusing respondent's requested instruction on the matter of justification, where the respondent's Vice-president testified that the bread was sold at the reduced price for the sole purpose of regaining its lost market; and where the petitioner admitted that the price cut was made in response to the boycott destroying respondent's market and admitted that the boycott continued at all times until nearly a year after the price was raised.

II During the first 3 months and 24 days of the price cut, petitioner made no sales across state lines. Under such circumstances the Trial Court erred in permitting the jury to take into consideration alleged losses accruing during such period.

III The evidence in this case shows that the value of petitioner's property was greater after the alleged illegal act than before such acts. Petitioner having failed to prove either the fact of damage or furnished data from which his loss could be reasonably estimated, the Trial Court erred

in permitting the jury to take into consideration loss of value of property in arriving at its verdict.

IV The petitioner sought to recover lost profits on the sale of bread, but petitioner: (1) was unwilling to say that he ever made a profit on bread (2) unwilling to say that he could have made a profit on bread in open competition, (3) admitted that his bread business was not profitable when in equal competition with respondent and (4) utterly failed to establish that he could have made a profit in the absence of the price cut. Under such testimony the petitioner failed to establish the existence of the thing sought to be recovered, and the Trial Court erred in permitting the jury to take into consideration alleged lost profits in arriving at its verdict.

PART C

I The petitioner has failed to establish lost profits and loss of value of property as summarized in III and IV above, and assuming that all other essential elements to recovery have been shown, his recovery is limited to nominal damages.

II The verdict of the jury was excessive and should be reduced for the reason that the petitioner sought to recover (1) an alleged loss of profits and (2) an alleged loss of value of property, but failed to prove the loss of either. Further the Trial Court's allowance of an attorneys fee of 60 per cent of the amount of the jury verdict was excessive and should be reduced.

Argument

Part A

I

THE DECISION OF THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE SITUATION PRESENTED IS WHOLLY LOCAL AND NOT VIOLATIVE OF SECTION 13 (a), TITLE 15 U. S. C. A. (SECTION 2 OF THE CLAYTON ACT) OR SECTION 13a, TITLE U. S. C. A.

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1. The Federal power of regulation may not be extended to embrace a wholly local activity having no effect upon interstate commerce or having an insubstantial effect upon such commerce.

The petitioner makes no contention that the complained of sales made by respondent in Santa Rosa, New Mexico, were in intrastate commerce, nor does he contend that such sales in any way affected such commerce. His entire position is that respondent is liable under the Sections because over three months after its initial price cut, respondent commenced making a few sales across the State line in Texas. This position is taken by petitioner in the face of the admitted fact that the sales at the reduced price in Santa Rosa were made for the sole purpose of combating a boycotting by the Santa Rosa merchants excluding respondent from its lawful market.

The power of Congress to regulate commerce carries with it the power to regulate any intrastate or local activity which affects interstate commerce, U.S. vs. Frankfort Distilleries, 324 U.S. 293; 65 S. Ct. 661; 89 L. Ed. 951; Mandeville Island Farms vs. American Crystal Sugar Co., 334 U.S. 219; 68 S. Ct. 996; 92 L.Ed. 1328. But effect alone is

not sufficient, for when it is determined that something forbidden has occurred in the course of intrastate or local activity, and an actual or threatened effect upon interstate commerce is established, the "*vital question*" becomes whether the effect is substantial or inconsequential; and if such effect is inconsequential, the activity lies outside the regulatory power. Mandeville Island Farms vs. American Crystal Sugar Co. (supra); U. S. vs. Wrightwood Dairy Co. 315 U.S. 110; 62 S. Ct. 523; 86 L.Ed. 726; Wickard vs. Filburn, 317 U.S. 111; 63 S. Ct. 82; 87 L.Ed. 122.

The case before the Court involves Section 2 of the Clayton Act (15 U.S.C.A. 13) and Section 13a, Title 15 U.S.C.A., neither of which can extend beyond the conferred powers of the legislative body enacting the provisions. This Court has held that the Sherman law embodies the maximum power and authority of Congress under the Constitution.

> "Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied, it 'exercised all of the power it possessed' ", U.S. vs. Frankfort Distilleries, 324 U.S. at 298, 65 S. Ct. at 664; also Apex Hosiery Co. vs. Leader, 310 U.S. at 495, 60 S. Ct. at 993; 84 L.Ed. 1311.

It follows then that Congress in enacting the Clayton law and the amendments thereto including Section 13a could not "occupy" any greater area than that occupied by the Sherman law; and that *if* Congress by the terms of the provisions in question left no "area of its constitutional power unoccupied" the provisions, as in the case of the Sherman Act, may not be extended to local activities having no effect upon interstate commerce nor to local activities having an insubstantial and inconsequential effect upon such commerce. The principal is recognized in U.S. vs. Frankfort Distilleries (supra) cited by petitioner on page 18 of his brief. The entire quotation set out in his brief is a spe-

cific recognition of the fact that Congress in the Sherman Act has exercised its full constitutional power but did not touch local transactions which did not have any substantial effect upon interstate commerce. The first portion of the portion quoted by petitioner reads:

> "—there is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states. It is true that this Court has on occasion determined that local conduct could be insulated from the operation of the Anti-Trust Laws on the basis of the purely local aims of a combination, insofar as those aims were not motivated by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce." 324 U.S. at 297; 65 S. Ct. at 663; 89 L.Ed. 951.

In *Atlantic Co.* v. *Citizens Ice & Cold Storage Co.*, Fifth Cir., 178 F(2) 453, Cert. Den., 339 U.S. 953; 70 S. Ct. 841; 94 L.Ed. 1365, Atlantic Ice Company brought suit against Citizens Ice & Cold Storage Company to enjoin defendants from cutting prices in the sale of its ice to local customers and sales to truckers and railroads engaged in interstate commerce. The plaintiff charged violation of Section 13a of The Robinson-Patman Act (Title 15 U.S.C.A.) and Section 2 of the Sherman Act (15 U.S.C.A. Sec. 2) alleging that the defendant had attempted to monopolize part of the trade and commerce among the several states, and charging that defendant in the course of interstate commerce made the sales for the purpose of destroying competition. The Court in holding the situation to be wholly local stated:

> "It remains true, however, that the distinction between intrastate and interstate commerce still exists; that 'it is the effect upon the interstate commerce or its

regulation, regardless of the particular form which the competition may take, which is the test of federal power', (Citing U.S. vs. Wrightwood Dairy Co., supra; Wickard vs. Filburn, supra; Mandeville Island Farms vs. American Crystal Sugar Co., supra) and that the question of whether the effect on interstate commerce is substantial and is still a controlling one." 178 F(2) at page 457.

The court concluded that the "effect, if any, upon interstate commerce was insubstantial, inconsequential and remote; and that the finding, that the price cutting was done to impose restraints on, or that it substantially affected interstate commerce, is without support in the evidence." 178 F(2) at page 458.

In that case there were price cut sales to persons who used the ice in furtherance of their interstate activity and was undoubtedly carried interstate. These sales were made directly in competition with the plaintiff; yet, the court found that the price cutting had only an incidental and inconsequential effect on interstate commerce. The interstate commerce in the present case is far removed from the price cut and the few sales made by respondent in Farwell, Texas, were not competitive in any way to the petitioner.

In *Ewing-Von Allmen Dairy Co.* v. *C. & C. Ice Cream Co.* (6th Cir. 1940), 109 F(2) 898; Cert. Den. 312 U.S. 689; 61 S. Ct. 618; 85 L.Ed. 1126, the appellant was a corporation selling ice cream cones in and about Louisville through soda water fountains and other retail outlets. Sometime after it had established its market, appellee was organized, first as a partnership and later as a corporation, for the purpose of selling ice cream cones, and opened stores at various points in Louisville for this purpose. Appellant, in an endeavor to retain its market, opened numerous retail stores and commenced nearly doubling

the size of its ice cream in cones, still selling them at five cents. The appellee was not in commerce, but the appellant sold a small percentage of its ice cream in other states. Although ice cream products of both parties were produced in Kentucky, the gelatins and flavorings were manufactured in other states. The appellee brought action for damages under the Clayton Act and obtained a verdict for $1,000.00, which was trebled. In reversing the judgment, the 6th Circuit said, in part:

> "The sole question is whether acts of the appellants in competition with the appellee have such a direct relation to interstate commerce as to affect and burden it within the purview of Title 15, Sections 1 and 2, U.S.C., 15 U.S.C.A., Sections 1, 2, and the decisions applicable thereto. Cf. Santa Cruz Fruit Packing Co. vs. National Labor Relations Board, 303 U.S. 453, 58 S. Ct. 656, 82 L.Ed. 954. If so, the judgment must be affirmed.—"

> "The Sherman Anti-Trust Act, 15 U.S.C.A. Sections 1, 7, 15 note, derives its authority from the power of Congress to regulate commerce among the states. Blumenstock Brothers Advertising Agency vs. Curtis Publishing Co., 252 U.S. 436; 40 S. Ct. 385; 64 L.Ed. 649. Assuming that transactions constituting intrastate commerce may come within the provisions of the Sherman Act (Local 167 vs. United States, 291 U.S. 293, 297; 54 S. Ct. 396; 78 L.Ed 804), *it still is necessary that appellee prove that the dealings of appellants, which form the subject matter of the complaint, operate substantially and directly to restrain and burden interstate commerce.* Cf. Santa Cruz Fruit Packing Co. vs. National Labor Relations Board, supra." 108 F(2) at 899-900.

Such has been the consistent holding of this Court and other Courts in both civil and criminal actions under both the Robinson-Patman Amendment and the Sherman Act, and, as we have demonstrated, the full constitutional

power does not reach a local activity having no substantial effect upon interstate commerce. *Wickard* v. *Filburn*, 317 U.S. 111; 63 S. Ct. 82; 87 L.Ed. 122; *U. S.* v. *Wrightwood Dairy Co.*, 315 U. S. 110; 62 S. Ct. 523; 86 L.Ed. 726; *Maltz* v. *Sax* 134 F(2) 236, Cert. Den. 336 U.S. 950; 69 S. Ct. 876; 87 L.Ed. 1720. Also, *U.S.* v. *Darby*, 312 U.S. 100; 61 S. Ct. 451; 85 L.Ed. 609, and authorities cited on preceeding pages.

Petitioner does not claim (because he cannot) that respondent's sales in Santa Rosa were in commerce or had any effect on it. His argument is that since respondent, some four months after its original price cut, sold a minute part of its bread just across the New Mexico line in Texas and made local sales in Santa Rosa in New Mexico at a less price than those at any other place, he is entitled to recover regardless of all the other essential elements. Such a construction entirely disregards the plain wording of the Statutes and the uniform decisions of this and all other courts.

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2. In the absence of sales interstate there could be no discrimination under either of the provisions.

The Clayton Act as amended by the Robinson-Patman Act has been on the books since June 19, 1936, and provides in part as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce,—" 15 U.S.C.A. 13(a)

Section 13a (Title 15 U.S.C.A.) was also approved on June 19, 1936 and provides in part as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce—to sell—." (15 U.S.C.A. 13a)

Both Sections require that the accused be "in commerce" and "*in the course of such commerce*" commit the forbidden act. The Clayton Act has the added clause "—*where either or any of the purchases involved in such discrimination are in commerce*—" which is a requirement that a sale be made in commerce. This in itself utterly defeats petitioner's action during the first 3 months and 24 days of the price cut because no sales of any character were being made by respondent outside New Mexico during that time.

With respect to the words "*either directly or indirectly*" following the words "*in the course of such commerce*" in the Clayton Act, we submit that the authors of the Act were cognizant of the then current decisions of this Court in drawing a distinction between activities directly affecting interstate commerce and indirect effects which was then isolated. (For example—*A. L. A. Schechter Poultry Corporation* v. *U. S.*, 295 U.S. 495; 55 S. Ct. 837; 79 L.Ed. 1570.) This may be interpreted as an expression of an intent on the part of Congress to include activities having an effect on interstate commerce, but of course, it could not be extended beyond the constitutional powers. However, it is most clear that Congress did not exercise the fullest of its powers because it required that sales be made in the stream of interstate commerce, and this Court so found in the case of Standard Oil Co. vs. F. T. C., 340 U. S. 231; 71 S. Ct. 240; 95 L.Ed. 239, where it stated:

> "In order for the sales here involved to come under the Clayton Act, as amended by the Robinson-Patman

> Act, they must have been made in interstate commerce." 349 U.S. at page 237.

Section 13a expressly requires that the accused be not only engaged in interstate commerce but that the forbidden act be committed "in the course of such commerce." No attempt is made in the latter act to reach an intrastate activity. This Court had a similar act before it in *F. T. C. v. Bunte Bros., Inc.*, 312 U.S. 343; 61 S. Ct. 580; 85 L.Ed. 881, involving the construction of Section 45a of Title 15 U.S.C.A. (64 Stat. 21) which declared unfair methods of competition "in commerce" unlawful and vested the Commission with enforcement powers. In construing the phrase "in commerce" this Court said:

> "This case presents the narrow question of what Congress did, not what it could do. And we merely hold that to read 'unfair methods of competition in (interstate) commerce' as though it meant 'unfair methods of competition in any way affecting interstate commerce' requires, in view of all the relevant considerations, much clearer manifestation of intent than Congress has furnished." 312 U.S. at 355.
>
> "When in order to protect interstate commerce Congress has regulated activities which in isolation are merely local, it has normally conveyed its purpose explicitly." 312 U.S. at 351.
>
> "The construction of Section 5, (15 U.S.C.A. 45,) urged by the commission would thus give a federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local law. Such control bears no resemblance to the strictly confined authority growing out of railroad rate discriminations. An inroad upon local conditions and local standards of such far reaching import as is involved here, ought to await a clearer mandate from Congress." 312 U.S. at page 350.

While it is true that the Act involved in the Bunte Bros. case is a different Section, there is no practical difference in the wording. If any exists it would favor the respondent because the words of Section 13a plainly require that the sale "at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, —" (15 U. S. C. A. 13a) be made "in the course of (interstate) commerce." The act could not apply to this case under any circumstances because the price was not reduced on goods moving across a state line.

It should be further noted that in the Bunte Bros. case this Court had before it an enactment which had been law of the land for a quarter of a century and during that time no effort had been made by the Commission to apply the Act to activities having only an effect upon interstate commerce and upon this point stated:

> "But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was conferred." 312 U. S. at page 352.

The Clayton Act has been on the books since October 15, 1914, and as amended by the Robinson-Patman Act since June 19, 1936. Section 13a (Title 15 U. S. C. A.) has also been on the books since June 19, 1936. During all these years no attempt has been made to apply the Sections in a manner as contended for by petitioner. His position is novel in that he seeks to apply the Acts without regard to the absence of interstate sales during the first 3 months and 24 days of the price cut and without regard to the absence of any connection between the complained of sales in Santa Rosa and interstate commerce or affectation thereon during the latter portion of the period of the price cut.

Both of the Sections require that there be sales in interstate commerce, so, obviously the provisions could not apply to the first three months and 24 days of the price cut, which brings us to the consideration of the period of the price cut during which a few sales were made in Farwell, Texas.

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3. The sales in Santa Rosa and the belated sales in Farwell, Texas, were not so related or connected that one could affect the other.

The provisions of the Sections themselves, as well as the authorities reject any theory that Congress has exercised the fullest of its powers, and it is quite clear that Section 13a could not under any circumstances apply because sales were not made in interstate commerce at a lower price than exacted elsewhere. The Robinson-Patman Act must be kept within constitutional limits and could reach only those intrastate activities which are shown to affect the flow of goods moving interstate in some substantial way. The Court of Appeals correctly applied the law to the facts of this case, and, though we do not want to be laborious, an examination of the facts will establish that the price cut was wholly local and did not have or threaten an adverse affect on interstate commerce.

From the time respondent started trucking its bakery products from its only bakery in Clovis, New Mexico, to Santa Rosa, New Mexico, on an unknown date in January of 1948 (R. 48, 47, 74), until after the boycott and price cut had been in effect 3 months and 24 days, the respondent's business was wholly local. No sales were made on the Texas side of the State line until December 27, 1948, (R. 131) following the date (September 3, 1948) of the boycott and

date of the price cut. R. 90. On December 27, 1948, and not until that date were sales of any character made in interstate commerce. At no time did the products sold in Santa Rosa by respondent pass across a state line. R. 48.

Mr. Moore tells us that when Mead's came to Santa Rosa in January of 1948 (R. 47) it solicited the stores, conducted themselves properly and took no unfair advantage of him. R. 75, 82, 89. He tells us that this practice enabled Mead's to place their products in "all the grocery stores" in "I think about two months." R. 76. No change took place in the competitive relationship until the morning of September 3, 1948, at which time the merchants of Santa Rosa by pre-arranged plan denied respondent the right to do business in that town by refusal to purchase their bakery products. R. 90.

When petitioner first saw evidence of respondent's presence in the town, he concluded—"I knew there wasn't enough business here for them and me both and when I drove by and saw my rack sitting on the sidewalk, (the respondent had installed a new rack, R. 81), I decided right then the quickest way out of town would be the best plan for me. It was the day I started planning to move to Tucumcari, and they gradually, I don't know how long it took them, I think about two months, to get into all the grocery stores." R. 75, 76. He leased a building in Tucumcari in June (R. 76) and a month before he planned to move he informed his landlord in Santa Rosa of his action. R. 76. The landlord, together with others, asked petitioner what it would take to keep him in Santa Rosa, and he replied that he didn't know of any thing that they could do to keep him there; but when they offered him all the business in the town, he decided to stay *if* the merchants "would support me one hundred per cent." R. 77. A petition was prepared and circulated and he tells us that "all

except one store signed the petition one hundred per cent." R. 76, 77. There was no doubt as to the intent of the petition or his meaning when he stated that he would stay in Santa Rosa if they "would support me one hundred per cent" because Mr. Moore says that "they had to quit buying Mead's bread" (R. 79) "just his bread" (R. 79), "wasn't supposed to buy any out-of-town bread" (R. 79, 87), so he "would not have any competition" and "would have a monopoly." R. 80.

He tells us that after the petition was signed by the merchants a meeting was held in a "little back room" to "decide on what day this petition would be effective, get them all together so that it would all be effective the same day." R. 86.

While the slaughter was being quietly planned and organized, respondent continued its grazing in a manner with which even Mr. Moore could find no fault. R. 75. Then at the prearranged time, the morning of September 3, 1948, (R. 90) the boycott struck and respondent's market in Santa Rosa was closed to it.

Mr. Corcorran, Vice-president of respondent, testified that he went to Santa Rosa the day the boycott struck and found that the merchants were refusing all Mead's products. R. 170. He tried to talk the merchants out of the boycott, but they all refused. R. 171. Confronted with this, he reduced the wholesale price of white bread in Santa Rosa to 7 cents per pound. R. 171, 172. There can be no doubt as to the cause of the price cut because Mr. Moore tells us very plainly—"and when I told him (his Santa Rosa landlord) about leaving, well, he got up in the air and told some others and none of them wanted me to leave, *and that is what started this petition, and that is what started the price cutting.*" R. 76. Mr. Moore further confirms the fact that the price was cut on bread only (R. 79) and only in the

town of Santa Rosa. R. 48, 97. He also confirms that no price cut took place on any other bakery products (R. 69), and testified that he lost no sales on bread outside the town of Santa Rosa (R. 49) and lost no sales on other items in or outside of Santa Rosa. R. 69.

Mr. Moore tells us that he was in competition with respondent in other towns and communities in the area, but no change in price took place there. R. 48. The price cut was confined to the small town of Santa Rosa.

Mead's recovered a part of their former customers; but when the price was returned to 14 cents on April 26, 1949 (R. 48), as well as at the time petitioner decided to close his shop on February 28, 1950, (R. 49), Mr. Moore tells us that he still held five stores exclusively which included the "biggest ones." R. 63. He further testified that the "boycott was still 'four-tenths' effective at the time he terminated his business." R. 94.

This decision to close his business 10 months after April 26, 1949, was made in the face of a very substantial increase in business. Between February 1, 1947, and January 21, 1949, (the year immediately preceeding Mead's entry in the market) he had gross sales amounting to $47,742.63. During the last 12 months of his operation he had gross sales of approximately $70,000.00. R. 113, 114.

Mr. Moore concedes and takes the position that the boycott and price cut was a fight between the merchants and Mead's and that he was not involved at all—

> Q. "As I understand your position here, this is a fight between Mead's and the merchants. Is that right? A. That is my position. Q. You weren't involved in it at all? A. No. Q. The merchants against Mead's, is that right? A. That is my position." R. 213.

Further, he says he could have stopped the boycott by requesting the merchants to do so, (R. 97) but he made no such request. R. 211, 212.

The very most that can be said of the facts of this case is that it reflects nothing more than a town squabble that never at anytime reached beyond the City limits.

The petitioner's operation was wholly intrastate, and such fact is conceded by him at pages 28-29 and 31 of his brief. The only commerce involved was the few sales of the respondent made beginning on December 27, 1948, (R. 131) on the Texas side of Texico-Farwell situated on the line between Texas and New Mexico. The respondent's Secretary-Treasurer testified that between the 27th day of December, 1948, and the day the price of bread was increased, its total sales on the Texas side were $2,392.39, that the overall sales of respondent during the period of the price cut were $135,129.00; and that on a percentage basis the sales in Farwell were 1.7 per cent of the total sales (216-217).

The sales in Santa Rosa and the belated sales in Farwell were two separate and distinct transactions. The sales in New Mexico were not conditioned or dependent in any manner upon the sales in Farwell, and the sales in Farwell were not dependent or conditioned in any manner upon the sales in New Mexico. No relationship is shown to have existed between respondent's customers in Santa Rosa and its customers in Farwell. They were merely retail grocers selling to local consumers. No sales were made in New Mexico or Texas to customers who in turn resold in interstate commerce.

The goods sold in Santa Rosa were trucked by respondent from its plant in Clovis, New Mexico, without passing across state lines, and it does not appear that any of the bakery items sold in New Mexico ever crossed a state line. There is no evidence of any alteration of prices in Farwell, nor does it appear that the sales in Santa Rosa 100 miles

West either brought about or threatened to bring about any disruption or injury to competition in Farwell as between bakers or retailers. Certainly the sales in Farwell had nothing whatsoever to do with bringing about the boycott-price cut, for such sales did not begin until several months after the boycott-price cut had begun; and it does not appear that such sales in any way contributed to the Santa Rosa trouble. No advantage appears to have been gained by respondent in Farwell by reason of the Santa Rosa sales and no gain flowed to respondent in Santa Rosa by reason of the Farwell sales.

The petitioner concedes that his business is wholly intrastate (petitioner's Brief at pages 29 and 31). He mentions cakes purchased by him from California but a casual reading of petitioner's Record references (pages 68 and 122) quickly reveals that the witness was being examined about his business during the year 1947 which was the year preceding the time of Mead's entering Santa Rosa. It does not appear in the Record that petitioner ever bought a penny's worth of materials, supplies or equipment outside of the State of New Mexico or sold anything outside that State after Mead's entered the market in January of 1948 and in particular, during the period of the price cut. Further, it does not appear in this Record that he purchased any item that had been shipped into the State[1] or that he sold to anyone who resold in interstate commerce after Mead's started doing business in Santa Rosa or during the period of the price cut.

If petitioner was doing an interstate business of any character he should have come forward and made positive proof of its existence during the period of the price cut and given

[1] If such proof did appear he must "—prove that the dealings of appellants, . . operate substantially and directly to restrain and burden interstate commerce." Ewing Von Allmen Dairy Co. vs. C. & C. Ice Cream Co., 109 F(2) 898, Cert. Den. 312 U. S. 689, 61 S. Ct. 618, 85 L.Ed. 1126.

some expression of its character, quantity and frequency. If Mr. Moore was adversely affected as a result of the price cut, the effect spent itself solely upon an intrastate activity and did not burden interstate commerce.

The aims were of a wholly local nature and this is not denied or disputed by the petitioner either in his testimony or in his brief. He takes the position that it was a "fight between Mead's and the merchants" in Santa Rosa (R. 13), brought about by the boycott (R. 76) and in his brief he seeks to overcome the local aim by an enlargement of the facts when he reasons that "If they can pick off and eliminate local competitors, as they did petitioner, monopoly and the destruction of competition will be the result." Petitioner's Brief p. 34. The problem is that the Record does not reflect that respondent has ever been guilty of "picking off" a competitor either in Santa Rosa or elsewhere. There is no evidence that it has ever been involved in a price cutting or other similar activity before or since this situation. The aims of respondent, consciously and unconsciously, did not extend beyond the town of Santa Rosa or for that matter beyond the recovery of the very market there taken from them. The reason for the ruling in *U. S.* v. *Frankfort Distilleries, Inc.* (*supra*) does not exist, nor does *The Shreveport* case (*Houston, E. & W. T. R. Co.* v. *U. S.*, 234 U. S. 342; 34 S. Ct. 833; 58 L. Ed. 1341) apply, because the New Mexico and Texas sales were not so related or connected that one could in any way affect the other.

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4. The price cut in Santa Rosa was wholly local and neither adversely affected nor threatened adverse effect upon interstate commerce.

The basic evils to interstate commerce sought to be prohibited by the sections upon which petitioner predicates his contention are not present in this case. Though the evidence utterly fails to bear him out, petitioner charges that he was eliminated as a competitor; and argues that if this be true, respondent must necessarily be convicted as a monopolist. In the light of this contention the facts must be examined to first determine its correctness and if correct then determine whether or not there was a resulting effect upon interstate commerce, which we shall certainly do in succeeding pages.

Antitrust violations are identifiable by resulting evils to commerce or to the public, such as: the power to restrict trade or fix prices. It is evidenced by a deterioration in the quality of goods or curtailment of production. When applied to the Federal acts in question such powers or burden must reflect themselves adversely upon goods moving interstate.

There is no evidence that respondent held the power to dictate the price of bread in Santa Rosa or any other place. It reduced the price of its bread, but no circumstances were shown which gave the slightest hint of the power to fix the price of any bread other than its own. The identical situation occurred in Tucumcari long after the troubled waters had been calmed in Santa Rosa when Mr. Moore cut the price of bread on Mead's (R. 214). Whatever power respondent possessed, Mr. Moore also possessed, and neither extended beyond the power that any ordinary merchant has to set the price of his own products. The power was balanced, which is not inconsistent with today's concept of competition. But assuming that Mead's had or acquired the power to fix prices, no circumstances appear which would justify a conclusion that it could extend beyond the town of Santa Rosa. However, respondent has not been convicted of acquiring a position of dominance in any

market. It was doing nothing more than fighting for its economic life in the single town of Santa Rosa.

There is no evidence of a deterioration of quality, and the facts themselves negate a curtailment of an interstate product on the grocery shelves in Santa Rosa. This is true even with respect to the petitioner's goods. His goods were never at any time removed from any bread rack in Santa Rosa. However, the respondent's goods were excluded at all times in either all or a substantial portion of the stores in Santa Rosa. Mead's never saw the light of day when Mr. Moore's goods were not sitting along side of its products, though Mr. Moore enjoyed the business of five of the stores without competition; (R. 93), and the day Mr. Moore closed his bakery, Superior Baking Company took his place (R. 175).

Disregarding the boycott and other evidence establishing the singular objective of regaining a lost market, had Mead's succeeded in obtaining a monopoly in Santa Rosa, it would have held no position of coersion over interstate goods; for it is not shown that such goods over which Mead's could exert such power were present in the market. It may be that the Robinson-Patman Act was designed to catch an evil in the "seed"; however, it was not designed to kill the flower that may or may not produce the "seed" of evil. Even a glint of the eye would not be sufficient. For the acts of respondent to amount to a possibility of achieving a coersive position with respect to interstate commerce, additional or more extensive, forbidden activity would be necessary.

There was no change in the competitive situation resulting from the price cut which could have had effect upon interstate commerce. The competition of the petitioner, if if existed, was not in commerce, and, if eliminated, would have had only a local effect. Nevertheless, there has been no determination by the jury or other judicial agency that

the price cut had anything to do with the closing of his business nearly a year after the price was raised. In fact the petitioner himself does not support the contention. In response to the question "and when Mead's came in there selling bread and offering bread at the same price you were offering it, your business was not profitable?", he answered, "That s right." (R. 213).

Again at page 212 of the Record:

> Q. "You knew in January after Mead's got there your business wouldn't be profitable with Mead's in town on a fair basis? A. Well, the size of the town wasn't large enough for anyone to run in. Q. But your business would not be profitable with Mead's in town on a fair basis, would it? A. Well, I wouldn't confine it to Mead's. Q. Well, Mead's or anybody else in town on a fair basis? A. That wouldn't be considered fair basis when you consider the size of their operation and mine."

Earlier in his testimony he was quite explicit on the matter of his position in the market prior to the boycott-price cut:

> Q. "You just couldn't make it there with Mead's in the market with you? A. That's right. Q. It was impossible for you exist? A. That's right. Q. So there was only two alternatives, to *either close down or move out;* is that right? A. That's right. Q. You reached that conclusion back in January, 1948; right? A. That's right. Q. And this price cutting didn't take place or the boycott didn't take place until September of 1948? A. That's right. Q. Some eight months later. A. That's right." (R. 82.)

Again at page 89 of the Record:

> Q. "All right, this was an organization of your friends, wasn't it? A. Yes, sir. Q. And you needed all of that Santa Rosa business to exist? A. Yes, sir. Q. And you had nothing against Mead's? A. No. Q.

> They had conducted themselves properly; is that right? A. Yes."

Mr. Moore's determination (1) that his business was not profitable and (2) that he "could not exist" in a fair market and (3) was compelled to close down or move out, remained unchanged because in June of 1948 he leased a building in Tucumcari, New Mexico (R. 76) and "about a month before he planned to move" he went to tell his landlord in Santa Rosa of his intended move (R. 76).

He again makes his position in the market clear after the boycott started and the price had been cut:

> Q. "You wanted then to go on with the boycott? A. Well, I wanted the business because I knew I had to have it to exist. Q. You kept hoping that the boycott would succeed? A. *It had to succeed before I could exist.* Q. You kept hoping that the boycott would succeed? A. Well, it had to." (R. 84.)

Further, the fact that he could have stopped the boycott but made no attempt to do so would (R. 97, 211) evidence the finality of his conclusion.

The evaluation of his "close down or move out" position in the market prior to the boycott would certainly establish his agreement that fair and equal competition was the moving factor which brought about his decision to close his business 10 months after the price of bread was raised. This, when coupled with the fact that the boycott was still 4/10ths effective (R. 94) and that he was doing 50 per cent more business than he was doing the year preceding any actual competition (R. 113, 114) becomes a compelling conclusion. Further he testified that his total loss as a result of the price cut was $250.00 (R. 103). Whether this loss or his loss resulting from his price cut in Tucumcari long after the Santa Rosa incident (R. 214) was the moving factor resulting in the closing of his shop remains an open ques-

tion. In view of the $200.00 profit loss in Santa Rosa it appears that his action in Tucumcari could have at least equally contributed to the closing. However, the more reasonable conclusion would be that he *decided* to close down because he had to compete in a fair market. We use the word "decided" because it was optional. He testified that at the time he closed his bakery it was solvent (R. 49), and the "decision" was made the day competition arrived in Santa Rosa (R. 76), and that decision remained unchanged as shown by the above testimony.

If an unnatural change did take place when petitioner decided to close his business, it was brought about by a decision on his part or as a result of events other than the price cut in Santa Rosa. The most that can be said is that if it contributed to the closing at all, its contribution was remote and inconsequential. This fact alone would defeat his action because the act is not designed to reach remote and inconsequential effects upon competition, *Signode Steel Strapping Co.* v. *F. T. C.*, 132 F(2) 48, or acts having the mere possibility of lessening competition. *Corn Products Refining Company* v. *F. T. C.*, 324 U. S. 726, at page 738; 65 S. Ct. 961 at page 967; 89 L. Ed. 1320; *Chicago Sugar Co.* v. *American Sugar Refining Co.*, 176 F(2) 1, Cert. Den.; 338 U. S. 948; 70 S. Ct. 486; 94 L. Ed. 584; *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346; 42 S. Ct. 360; 66 L. Ed. 653. In any event such effect that the respondent's price cut may have had was confined to the petitioner alone and to the area of his operation, if not to the town of Santa Rosa alone, with no resulting effect on interstate commerce.

Respondent submits that the evils of monopoly and restraint are not present in this case; and if by mental process the circumstances favorable to the respondent be disregarded, the acts complained of in no way adversely affected or threatened an adverse effect on interstate commerce.

5. *The Porto Rican American Tobacco Co.* v. *American Tobacco Co.* and *Corn Products Refining Co.* v. *F. T. C.* cases do not support the position of petitioner.

The Court of Appeals' decision in this case is consistent with *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F(2) 234, Cert. Den., 279 U. S. 858; 49 S. Ct. 353; 73 L. Ed. 997; *Corn Products Refining Co.* v. *F. T. C.*, 324 U. S. 726; 65 S. Ct. 961; 89 L. Ed. 1320; and other authorities relied on by petitioner. In the *Tobacco Company* case American shipped its cigarettes from the United States, where they were manufactured, to Porto Rico were the discrimination took place. In that case commerce between the United States and Porto Rico was used or utilized in carrying out the forbidden practice, which certainly distinguishes it from the case at hand. There the commerce used to injure competition could be constitutionally regulated. Further distinction is found in the fact that both "legs", as petitioner phrases it, were in a commerce which fell within the Congressional power. The makers of Lucky Strikes made no contention that their commerce within the United States was confined to a single state. Such is not the case here. The only commerce subject to regulation in this case is the few unrelated sales made in Farwell.

In the *Corn Products* case the Court discarded again the artificial separation of production and manufacturing from interstate commerce and applied the affectuation principal and found that the local activity did adversely affect such commerce.

> "But the effect upon the commerce is amply shown by the interstate and national character of the Curtis Company's business; by petitioner's advertising for Curtis, which was itself frequently in interstate com-

> metes, amounting to $75[illegible]; and by Curtis' own admission that it competed in the sale of its candy in interstate commerce, with all manufacturers of one cent and five cent bars of candy. Moreover, some of petitioners' sales to other companies, to whom these allowances were not accorded were made in interstate commerce——" 324 U. S. at page 745, 65 S. Ct. at page 970.

It appears that the discriminatory advertising was given to Curtis Candy Company who was in commerce and denied to other customers who competed with Curtis in interstate commerce. Here again we have the adverse effect flowing across state lines by the conferring of a forbidden advantage to a preferred customer who competed in interstate with other Corn Products Refining Co. customers. Further, the discriminatory act itself, advertising, was in interstate commerce. Petitioner, in quoting only the last sentence of the above quotation at page 25 of his Brief, mislead himself into overlooking factual matter appearing in the immediately preceding sentence which gives his quotation an entirely different meaning. The distinction between the *Corn Products* case and our case lies in the obvious fact that here again the forbidden act itself (the advertising) passed across state lines and was conferred upon Curtis who in the course of its interstate commerce received the benefit to the detriment of its competitors who were also in interstate commerce.

Petitioner cites *F. T. C.* v. *Morton Salt Co.*, 334 U. S. 37, 68 S. Ct. 822; 92 L. Ed. 1196, but in that case the very sales complained of were in interstate commerce. He also cites upon *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, 68 S. Ct. 996; 92 L. Ed. 1328 as best illustrating "the anachronistic decision of the Court of Appeals." In that case the defendants were three refineries in California, and the plaintiffs were all beet

growers in the same state. The defendants entered into an agreement fixing the price to be paid by each refinery for sugar beets, which resulted in a reduction in the price the growers received, and they sued for treble damages. The complaint was dismissed by the trial court on the theory that the transaction was entirely within the State of California. The Ninth Circuit affirmed. It may be said that there was a stipulation in the Record which both courts interpreted as an agreement by the plaintiff that the price fixed for sugar beets had no effect on commerce. This Court, not so interpreting the stipulation, reversed, on finding that all or nearly all of the sugar refined from the beets was shipped in interstate commerce, and that the price paid for sugar beets had a direct and substantial affect on the price of sugar which was an article moving in interstate commerce. The court did not determine that the raising of beets in California was interstate commerce, it merely held that the arrangement between the refineries substantially affected such commerce and came within the provisions of the Anti-trust laws.

The same distinction can be found in every case cited by petitioner, and he makes no claim whatsoever that the sales in Santa Rosa in any way affected interstate commerce and the evidence forecloses such a contention.

We submit that the complained of sales in Santa Rosa did not affect interstate commerce in any substantial manner, and that the Circuit Court correctly reversed the Trial Court's Judgment and ordered the dismissal of petitioner's complaint.

II

THE COURTS WILL NOT DISREGARD THE SEPARATENESS OF DISTINCT CORPORATIONS FOR THE REASON THAT THE STOCKHOLDERS OF RESPONDENT CORPORATION ALSO OWN STOCK IN TEXAS CORPORATIONS ENGAGED IN SIMILAR BUSINESS IN TEXAS UNLESS IT BE SHOWN THAT THE CORPORATE ENTITIES WERE BEING USED FOR SOME UNLAWFUL PURPOSE CONNECTED WITH PETITIONER'S ACTION.

Though the Record utterly fails to support him, the petitioner argues that respondent is a part of an interstate combine by reason of the fact that the holders of stock in the respondent also own stock in one or more corporations engaged in a similar business in Texas, though there is no showing that the ownership is similar either in the individuals owning the stock or the amount owned by each. Petitioner does not make clear his intended application of such an argument.

He makes no contention that the sales in Sant. Rosa in any way affected the operation of the separate corporation or corporations doing business in Texas, nor does he argue that there is any relation between the sales at Santa Rosa and the Texas operation. He makes no showing, nor does he argue, that the corporations hold any position of dominance in any market, or that they have ever at any time contravened any law or become involved in any activity even suggesting a violation of any State or Federal Anti-trust law. He merely sees evil in a person owning stock in two corporations doing a similar business.

He does not argue that the Texas corporations were doing an interstate business, because he cannot, nor does he even suggest that any gain resulted to them. He does not contend that the respondent was an instrumentality of any other corporation, nor does he suggest that any other corporation was the agent or instrumentality of the respondent. The whole proof established facts totally unrelated to petitioner's complaint

The evidence offered shows that the respondent is a New Mexico Corporation with a capital of $20,000.00. The stockholders at the time in question were Mack Mead, Bill Mead, E. E. Corcorran and W. L. Mead. The book value of respondent on May 27, 1949, was $59,965.10 (R. 130, 132).

Mead's Service Company was a corporation authorized to do business under the laws of the State of New Mexico with a capital of $20,000.00. Billy Mead is President, Ed Corcorran, Vice-President, Mack Mead, Secretary-Treasurer. The stockholders and directors are those just named plus Alex K. Miller (R. 129, 130). This corporation was engaged in the business of training bakers and salesmen (R. 125, 130). Mead's Service Company was dismissed from this action by the court at the close of the evidence *on motion of the petitioner* (R. 222).

Mead's Fine Bread Company of Chavis County stockholders are Alex K. Miller, W. L. Mead, Bill Mead and Mack Mead, and E. E. Corcorran. Capital $17,000.00 (R. 133).

The witness, Mack Mead, testified that his father, W. L. Mead, had owned for several years a bakery in Big Spring, Texas. He further testified that W. L. Mead owns stock in Mead's Fine Bread Company of Lubbock, Texas, and an interest in a Hobbs Corporation, in July of 1949, which was dissolved and its property acquired by Mead's Fine Bread Company of Lubbock, Texas, in 1952 (R. 135). All of which occurred after the time in question in this case. Billy Mead was a stockholder and officer in Mead's Fine Bread Company of Lubbock and was a stockholder in Mead's Fine Bread Company of Big Spring (R. 125). The witness, Mack Mead, Secretary of the respondent, testified that the Corporations were *not* operated as one business (R. 138), and that all checks written by the respondent were signed by its bookkeeper and plant manager (R. 136). He stated that the officers of the respondent lived in Lubbock, Texas, and made

frequent trips to Clovis in carrying out their duties (R. 142). Mack Mead further testified that he recalled two emergency occasions when bread was hauled from Lubbock to Clovis for a day or day and one half when there was a plant breakdown or shutdown (R. 142). Just when such breakdown or shutdown occurred was not shown. The ownership in the Texas Corporations does not appear to be identical with that of the respondent either with respect to persons or percentage of ownership.

The witness, Mack Mead, further testified that there were a number of other bakeries in New Mexico, Texas and Oklahoma, using the name "Mead" in some undisclosed manner, which were owned by a cousin and an uncle of the witness. None of the stockholders of respondent own interest in any of such other bakeries (R. 133, 134).

Petitioner introduced the deposition of Rex Webster, a member of a firm engaged in the advertising business in Lubbock, Texas, who handled a substantial portion of the advertising used by the separate corporations. (See totals of billing to each of the separate corporations over a period of three years.) (R. 249-51.) The witness listed a number of other clients his firm represented (R. 152). He said his firm handled and placed all advertising through the direction of the officers of the separate corporations and that radio, newspaper, billboards, circulars, motion pictures and point of display mediums were used (R. 146). He testified that the different corporations sold bread labeled Mead's Fine Bread, that advertising programs varied with each separate corporation when tied to some event, and that part of the advertising was substantially the same (R. 151-2). He stated that he was paid by the individual corporations (R. 152). The respondent introduced samples of advertising (R. 253-259) and two instruments identified as a joint order for flour from Harvest Queen Mill & Elevator Company (R. 169, R. 279).

Courts will look behind a multi-corporate set up only if there is evidence of a purpose to evade a statute or to practice a fraud upon third persons. *Esmond Mills* v. *Commissioner of Internal Revenue*, C. C. A. (2) 753, at page 755; Cert. Den.; 319 U. S. 770; 63 S. Ct. 1432; 87 L. Ed. 1718; *E. Albrecht & Son* v. *Landy*, 114 F(2) 202; *Stone* v. *Eacho*, 127 F(2) 284, Cert. Den.; 317 U. S. 635; 63 S. Ct. 54; 87 L. Ed. 512.

There is nothing immoral or illegal for a person or persons to hold stock in as many corporations as he likes even though they are engaged in a similar business. The same is true of a man sitting on more than one Corporate Board of Directors or holding office in more than one corporation. The petitioner presented one or two isolated instances of a common undertaking on the part of two or more of the corporations, none of which are connected in any manner with petitioner's complaint.

If there are advantages in using the common family name as a corporate and product name, the law does not condemn the practice unless it be shown that someone was misled to his detriment. A pooling of purchasing power is neither evil nor unlawful, unless it is shown to have been used for some unlawful purpose. It is dictated by good business practices and no evil design appears.

The use of a common name has its business advantages. That is why the name "Ford" or "Chevrolet" is a part of the business name of nearly every Ford and Chevrolet dealer in the country. When a name is attached to a good product for a long time, the name becomes synonymous with the product. Good business practices would again dictate the use of the family name as a name for its products. Nothing fraudulent or cynical can be found in that.

The material or supplies purchased on a common order does not evidence a disregard of the corporate entity. The proof must go further and show a commingling of the re-

terials or supplies purchased. Here the purchase order shows the price each corporation must pay and payment is due "as bad" (R. 279, 283).

The subject is discussed in *Owl Fumigating Corporation* v. *California Cyanide Company, Inc.*, 30 F(2) 812. In that case the court stated that identity of corporate names, the relation of principal and agent, identity of officers or the loan of money by one to the other, even in large amounts, does not disturb or bring together distinct corporate entities. The Court further stated at page 812 that:

> "When as against the general rule that two separately incorporated companies are separate and distinct entities, it is charged that one is a mere agency or department of the other and is used as an instrumentality to perpetrate fraud, justify wrong, avoid litigation or render it more difficult, or generally to escape liability for what are in substance its own acts, courts will put aside the screen—and place responsibility where it belongs."

On this subject see also *Nichols & Co.* v. *Secretary of Agriculture*, 131 F(2) 651; *State* v. *Swift & Co.*, 187 S. W. (2) 127 at page 133. (Error refused.)

The evidence on this issue was not sufficient to apply the rule of agency or instrumentality to the respondent. There is not the slightest hint of evidence that one corporation was using the other for any purpose whatsoever, and in particular, for any purpose in connection with the complaint in this case. There is no evidence of a commingling of property, money or business. On the contrary each paid its own way and conducted its own business. The respondent is not shown to be a dummy. It is an entity with a governing board and officers, it has its capital and is engaged in business in Clovis, New Mexico. It was charged and cited, it answered and has been tried and convicted by the trial court of a crime it is alleged to have committed. The

petitioner does not seek a recovery against the Texas Corporations and has made no charge against them. He only argues that they exist but makes no showing of any relation or connection between the Santa Rosa sales and the activities of the Texas Corporations nor does he show that one was dependent upon the other.

The evidence in this case is wholly insufficient to support a finding that the separate corporations were all a single enterprise forming an interstate combine that would justify treating the sales of any other corporation as the sales of the respondent.

It is submitted that the Court of Appeals disposition of this cause is correct and should be affirmed.

III

THE DOCTRINE OF "THE LAW OF THE CASE" IS NOT APPLICABLE TO QUESTIONS NOT DETERMINED IN A PRIOR LEGAL DECISION NOR IS THE DOCTRINE A LIMITATION UPON THE POWER OF THE COURT TO RECONSIDER SUCH PRIOR DECISION.

The contention of the petitioner that the Court of Appeals has heretofore disposed of this case cannot stand for three reasons:

(1) The question involved, if it has been previously determined, was decided against the petitioner by the lower Court in its first opinion, (see below) wherein the Court expressed extreme doubt that the situation here presented was wholly local having no impact on interstate commerce,

(2) the doctrine of "the law of the case" is not a limitation upon the power of a court to reconsider prior decisions; and,

(3) we know of no case where an upper court has denied the power of a lower court to reconsider its previous determinations.

The Court of Appeals in its first opinion (184 F(2) 238 at page 340) stated:

> "It is extremely doubtful whether the discriminations complained of come within the provisions of the Robinson-Patman Act. * * * The only interstate features were that the defendants made some sales in Texas which were unaffected by the discriminations. It seems clear that we have nothing more than a local price cutting never having any affect or impact upon interstate commerce and placing no burden upon the same."

In its second opinion, reported in 190 F(2) 540, the Court did not go back into the effect of the Santa Rosa sales on interstate commerce; and in its last opinion said:

> "But in leaving the case to the undetermined facts, we did not thereby intend to hold or imply that the mere fact of interstate commerce and local price discrimination, standing alone, made out a prima facie case for the plaintiff. Indeed, on first consideration, doubt was expressed whether the purely local price-cutting war had any actionable effect or impact upon interstate commerce." 208 F(2) 777 at 778.

The Court of Appeals makes it quite clear that it did not intend, by the reversal of the case in the second opinion, to foreclose the question of whether or not the sales in Santa Rosa affected interstate commerce. If it had, we know of no rule denying the court the power to reconsider its previous decision. The doctrine of "the law of the case" expresses only the "disinclination on the part of an appellate court to re-examine its own prior legal pronouncements in the case, but the doctrine does not destroy its power to do so. *Commercial Nat'l. Bank in Shreveport v. Cognilly*, Fifth Cir., 176 F(2) 1004. To same effect: *State of Kansas v. Occidental Life Ins. Co.*, Tenth Cir.,

95 F(2) 935, cert. den., 305 U. S. 602; 59 S. Ct. 63; 83 L. Ed. 383; *General Motors Acceptance Corporation* v. *Mid-West Chevrolet Co.*, Tenth Cir., 74 F(2) 386.

The Supreme Court in *Roswell E. Messinger* v. *Peter Anderson*, 225 U. S. 436; 32 S. Ct. 739; 56 L. Ed. 1152, says that the doctrine—

> ". . . merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. (Citing authorities) of course, this court, at least, is free when the case comes here."

The Court of Appeals was of the opinion that it left open the question decided by it, and we know of no one in a better position to interpret its opinions.

Further, the earlier denial of certiorari is not equivalent to an affirmance of the earlier opinion of the Court of Appeals, *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U. S. 251 at 257-258; 36 S. Ct. 268; 60 L. Ed. 629; but in any event the granting of this Writ opens the entire record even though the Court of Appeals may or may not have considered a matter on a previous appeal, because a previous denial is not an expression upon the merits of a case. *Brown* v. *Allen*, 344 U. S. 443 at 456; 73 S. Ct. 397; 97 L. Ed. 469; *House* v. *Mayo*, 324 U. S. 42 at 48; 65 S. Ct. 517; 89 L. Ed. 739.

The lower Court contravened no law in its last disposal of the case, and its decision is correct and should be affirmed.

IV

THE EVIDENCE IN THIS CASE ESTABLISHES THAT THE PRICE CUT DID NOT HAVE AND COULD NOT HAVE HAD THE EFFECT OF SUBSTANTIALLY LESSENING, INJURING OR DESTROYING COMPETITION.

There are other reasons why the Court of Appeals' decision should stand. Sections 13(a) and 13a (Title 15

U. S. C. A.) makes unlawful a discrimination provided certain indispensable elements are present.

In Section 13(a) it must appear that:

> "* * * the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce,—"

and in Section 13a the objective of the discrimination must be one—

> "of destroying competition, or eliminating a competitor * * *"

The subject matter of the Sections is "competition." It seeks to preserve nothing but competition—not property or property rights. The public has no interest in a competitor's property. Its interest is limited to the continuance of open competition, and the law seeks to protect the public by preserving competition. For the petitioner to recover, therefore, it must be made to appear that "competition" has been or probably would have been lessened or destroyed as a result of a discrimination. *Corn Products Refining Company* v. *F. T. C.*, 324 U. S. 726; 65 S. Ct. 961; 89 L. Ed. 1320; *Chicago Sugar Company* v. *American Sugar Refining Company*, 176 F(2) 1, cert. den.; 338 U. S. 948; 70 S. Ct. 486; 94 L. Ed. 584.

It necessarily follows then that in order for a violation of either section to occur it is indispensable that a "competition" exist; and to produce an injury to the petitioner, under such provisions, he must show himself to be a "competitor" to come within their provisions.

The petitioner has repeatedly testified that he could not exist with Mead's in the market on a fair basis (R. 82, 84, 89, 212), and that he had to either close down or move out (R. 82). Having determined his status, he decided to move and rented a building in Tucumcari. About a month

before time of the move he informed his Santa Rosa landlord (R. 76), and when he told the landlord "about leaving" (we quote Mr. Moore) "he (the landlord) got up in the air and told some others and none of them wanted me to leave, and that is what started the petition,—" (R. 76). The landlord "got some fellows together and they called me up and asked me what it would take to keep me in Santa Rosa and not move my plant, and I told them I didn't know. I didn't know of anything they could do. I didn't think there was anything possible to do to keep me there, and they talked a while and asked me if I would stay if all the merchants in town agreed to patronize me. And after thinking it over two or three days and all the odds and ends of going and everything, I decided if the merchants wanted me to stay that bad I would stay if they supported me one hundred per cent. So these fellows got out the petition,—" (R. 77). Mr. Moore makes clear the conditions under which he would remain in Santa Rosa and these conditions found expression in the petition and the subsequent boycott. To him it meant that the merchants were required to "quit buying Mead's bread" (R. 79) or any other "out of town bread" (R. 87), "just buy his bread" (R. 79) so that he "would not have any competition" (R. 80, and "have a monopoly." (R. 80).

Up to this point he conclusively establishes that he did not remain in Santa Rosa to compete. There being no doubt as to the condition upon which Mr. Moore agreed to remain, his attitude relative to the matter of competition in Santa Rosa after the boycott was under way must be examined to determine whether or not he ever changed his mind and decided to compete in an open and equal market. On this he testified as follows:

> Q. "You wanted them to go on with the boycott?
> A. Well, I wanted the business because I knew I had

to have it to exist. Q. You kept hoping that the boycott would succeed? A. It had to succeed before I could exist. Q. You kept hoping that the boycott would succeed? A. Well, it had to." (R. 84).

Mr. Moore further says that he could have stopped the boycott at any time (R. 97) but made no effort to do so. (R. 211, 212).

A clearer declaration of a refusal and continuance of a refusal to compete could not be made. HE ONLY REMAINED NOT TO COMPETE. The record is utterly barren of any expression of any willingness to remain in Santa Rosa and compete on a fair and equal basis with anyone.

We are not talking about any illegal act on the part of Mr. Moore, for it is assumed that a man has a right to refuse to compete. He says he had nothing to do with the boycott (R. 212, 213), and respondent does not take issue, because the question is not whether Mr. Moore committed any illegal act; but whether the competition created by his business under the continued circumstances of refusal to compete is a competition at all that could be lessened, injured, eliminated or destroyed. Under the circumstances of Mr. Moore's refusal to compete it would have been utterly impossible for the alleged illegal acts to adversely affect the competition in Santa Rosa.

These articles are not designed to prohibit discriminations having the mere possibility of a lessening of competition or the creation of a monopoly. *Corn Products Refining Co.* v. *F. T. C.*, 324 U. S. 726 at page 738; 65 S. Ct. 961 at page 967; 89 L. Ed. 1320, nor is it intended to reach every remote, trivial or sporadic lessening of competition. *Signode Steel Strapping Co.* v. *F. T. C.*, 132 F(2) 48; *Minneapolis-Honeywell Regulator Company* v. *F. T. C.*, 191 F(2) 786. Any resulting injury to competition in Santa

Rosa flowing from the price cut must have been trivial for he was never at any time willing to compete.

All of this points up the ridiculousness of the situation. The respondent was accused, convicted and fined $$8,400.00 by the trial court for an alleged injury to a "competition" that even the competitor, our accuser, says did not exist. Mr. Moore's claim is a personal grievance that respondent ought not be permitted to compete with him on an equal basis. Personal grievances are not actionable under the antitrust laws. *Shotkin* v. *General Electric Company*, 171 F(2), 236, cert. den., 336 U. S. 950; 69 S. Ct. 876; 93 L. Ed. 1105. *First National Pictures* v. *Robinson*, 72 F(2) 37 at page 40. Cert. den.; 293 U. S. 609; 55 S. Ct. 125; 79 L. Ed. 709.

It is respectfully submitted that "competition" as contemplated by the Sections did not exist and therefore could not have been lessened, injured, destroyed or eliminated, and that the Court of Appeal's disposition of petitioner's action ought to be affirmed.

V

THE PRICE CUT WAS MADE IN RESPONSE TO A CHANGED CONDITION AFFECTING THE MARKET FOR AND MARKETABILITY OF RESPONDENT'S GOODS WITHIN THE MEANING OF THE FOURTH PROVISO OF SECTION 13(a) AND IS EXCLUDED FROM THE PROVISIONS OF THE ROBINSON-PATMAN ACT.

The fourth proviso contained in Section 13(a) (Title 15 U. S. C. A.) provides as follows:

> "And provided further, that nothing contained in Sections 12, 13, 14-21, and 22-27 of this title shall prevent price changes from time to time where in response to changing conditions affecting the market for, or the marketability of, the goods concerned, such as, but not limited to, actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress

sales under court process, or sales in good faith in discontinuance of business in the goods concerned." (15 U. S. C. A. 13(a))

This proviso reflects a Congressional realization that it was delving into a bottomless pit when it passed the act; and we think that the Court of Appeals committed error when it held in the prior appeal (190 F(2) 540) that the proviso was limited only to the situations listed; and that this Court erred in denying certiorari (342 U. S. 902; 72 S. Ct. 290; 96 L. Ed. 675). It occurs to respondent that to give effect to the proviso, the words "such as" refer to situations similar to the specific examples listed; and the words "but not limited to" are an enlargement. To give the latter words meaning they must refer to instances other than those listed which affect "the market for or the marketability of the goods concerned," otherwise, we give both the same meaning and one would be surplusage.

The respondent urges that the market for and marketability of its goods was destroyed in Santa Rosa on September 3, 1948. The boycott and its purpose was admitted (R. 79, 80, 87). This was a decided change in the market for its products. The continuance of the boycott is admitted by the petitioner and he said the boycott had to continue for him to exist (R. 84.) He further stated that he could have stopped the boycott but made no attempt to do so and concedes that the boycott was still 40 per cent effective when the price was raised (R. 94, 97).

> Q. "Is that right? The petition or boycott was still four-tenths, or four out of ten still effective in so far as the boycott and petition were concerned? A. Yes." (R. 94.)

If there had been the slightest hint that Mead's had in any way provoked the merchants action, the matter would be one of fact; but such provocation does not appear. Fur-

ther, any suggestion that Mead's action was excessive in any respect is repelled by the fact that respondent says that the boycott was still 4/10ths effective and that he held at least 4, if not 5, of the stores exclusively even until the day he closed (R. 93).

We respectfully ask the Court to reconsider this matter and pray that the decision of the Court of Appeals in reversing and directing dismissal of petitioner's action be affirmed.

Conclusion

It is respectfully prayed that the action of the Honorable Court of Appeals in reversing the Trial Court's Judgment and directing dismissal of petitioner's action be affirmed for each of the reasons set forth in that Court's opinion and contained in this brief in support thereof. In the alternative, should it be determined that it violated one of the Sections but not the other, respondent prays that the cause be reversed and remanded for new trial.

Part B

ASSIGNMENTS OF ERROR BROUGHT FORWARD IN SUPPORT OF THE REVERSAL OF THIS CAUSE BY THE COURT OF APPEALS.

Without prejudice to its argument in support of the decision of the Court of Appeals in reversing and directing the dismissal of petitioner's action, the respondent brings forward points of error in support of the reversal of the cause by that Court. Each of the points presented were preserved in the appeal from the trial court's judgment and argued to the Court of Appeals, but were not passed on by that Court.

Assignment No. 1

IN AN ACTION UNDER SECTION 13 OF THE ROBINSON-PATMAN ACT (TITLE 15 U. S. C. A.), THE ACCUSED WAS ENTITLED TO SHOW JUSTIFICATION FOR THE SALE OF ITS BREAD AT A REDUCED PRICE WHERE IT APPEARS THAT SUCH A REDUCTION IN PRICE WAS MADE IN RESPONSE TO A BOYCOTT EXPELLING IT FROM THE MARKET.

Section 13(b) of Title 15 U. S. C. A. provides:

> "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination; provided, however, that nothing contained in Section 12, 13, 14 21 and 22 27 of this title shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of competitors, or the services or facilities furnished by a competitor." Article 13(b) Title 15 U. S. C. A.

Respondent's requested instruction appears at page 247 of the Record which was in substance a request that the Jury be instructed that under certain circumstances a person or corporation is justified in selling his or its products at one price in one place and another price in another place, and if the Jury found that the respondent sold its bread at the reduced price in good faith solely to break the boycott, their verdict should be in favor of the respondent, because it would have been deemed under the law to have been justified.

The request was refused (R. 247), and the court specifically instructed the Jury as follows:

> "That agreement and that boycott, if it existed, would not be a defense to the plaintiff's cause of action" (R. 233).

Again:

> "If that boycott existed, I specifically instruct you, shall not specifically consider it a defense to the plaintiff's cause of action" (R. 233).

The instructions of the trial court seems to obliterate any right of self defense regardless of the seriousness or nature of an attack. We do not know of anything more vicious or serious that could occur to a trading business than the boycott thrust upon respondent by the merchants in Santa Rosa admittedly without provocation. It is admitted that its business methods were fair in every respect (R. 75, 82, 89), and petitioner himself says that the "petition" started the "price cutting" (R. 76). He even recognized respondent's point of view when the boycott struck:

> Q. "They sold their bread at this reduced price for the purpose of combating this attack or thing that was done to them, did they not? A. Well as you said a while ago, that is the way they looked at it, but I looked at it differently" (R. 89).

Mr. Moore tells us that the boycott was still 4/10ths effective when he closed his business (R. 94) February 28, 1950. This was one year and a half after the boycott struck on September 3, 1948 (R. 90), and 10 months after the price was raised on April 26, 1949 (R. 48). It would be a fair conclusion, then, that respondent raised the price of bread at a time when the boycott was still 40 per cent effective.

The respondent's Vice-president testified that he called on the merchants and tried to talk them out of the boycott,

but that they refused (R. 170). This left him with the alternatives of quitting the market or of cutting the price of bread (R. 171, 172). He further testified that the price reduction was made to break the boycott and was not directed at Mr. Moore (R. 175). He stated that if the merchants had at any time offered to take Mead's bread the price would have been raised (R. 175). Mr. Moore does not disagree with this because he swore that it was a fight between Mead's and the merchants (R. 213).

The boycott was a contemptible plot of destruction contrived in "little back room" methods. What course was open to Mead's? They could not counter in like kind. Were they required to yield? If so, what recourse was open to them? It was suggested that it could sue, but who would they sue? Not Mr. Moore, for he says it was a fight between Mead's and the merchants, and that he was not involved (R. 213). A suit against their former customers would be suicide. Seller-customer relationships are founded in service and quality of goods, not from lawsuits charging violations of antitrust laws. Practical business men would agree, that Mead's did the only thing that they could do, and that they were justified in reducing the wholesale price of bread.

The act itself provides that after a *prima facie* case has been made the burden then rests upon the accused to show justification and "unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination:——" It follows then that if justification is shown then the Commission could not issue the order. No reason appears to deny the accused of the defense as against a private litigant and grant such right of defense against the government. The aggrieved party acquires no greater right under the provisions than the governmental agency charged with enforcement. The remedy only differs.

The Fifth Circuit expressed the opinion that justification may be shown in *Gamco, Inc. v. Provident Fruit & Produce Company*, 194 F(2) 484; Cert. Den.; 344 U. S. 817; 73 S. Ct. 11; 97 L. Ed. 636.

In that case the accused refused the plaintiff space in a building located and designed to accommodate fruit and produce dealers that appeared to have certain business advantages. On the question of justification the court had this to say at page 488:

> "The conjunction of power and motive to exclude with an exclusion not immediately and patently justified by reasonable business requirements establishes prima facie case of the purpose to monopolize. Defendants thus had the duty to come forward and justify Gamco's ouster."

At page 489:

> "As indicated above, it is incumbent on one with the monopolist's power to deny a substantial economic advantage such as this to a competitor to come forward with some business justification."

Judge Phillips in his concurring opinion contained in the second decision of the Court of Appeals (*Moore v. Mead Service Co.*, 190 F(2) 540) was of the opinion that under the state of facts presented, Mead's ought to be allowed to show justification; and the facts being more fully developed in this case reflects greater reason to permit such showing.

We urge that the Act requires that any evidence that reasonably tends to justify a discrimination must be heard and passed upon along with *prima facie* evidence of the discrimination.

By this Section Congress did not limit the right of defense, it only strengthened the previous section by shifting

the burden of proof as soon as the minimum proof had been made. The "proviso" to Section 13(b) was added by the Robinson-Patman Amendment because of the stringent provisions of Section 13(a) and other parts of the Act, which, standing alone, could easily have resulted in confusion as to whether or not the meeting of a lower price of one competitor would be a discrimination as to other competitors not meeting the lower price. Such a situation could result in a discrimination as to one competitor and at the same time only a meeting the equally low price of the other. We do not believe that the Proviso part of the Section is a limitation of the first portion. It broadens it if anything.

The Congress and the Courts have at all times maintained a practicality in the enactment and application of antitrust laws, and for good reason. The intricacy and complexities of our economic system will not permit narrow, rigid rules of conduct. The Congress recognized this principle when it added Section 13(b) to the Act. Otherwise, untold mischief could and would have resulted not only to the trader but to the public the law seeks to protect.

We submit that the trial court erred in refusing the instruction, and that the error was not cured on a presumption that the jury based its finding upon Section 13a. We have no way of knowing what the jury believed or found, and since the verdict has been rendered under an incorrect instruction as to one of the two counts it may not stand. *Joseph C. Kelley* v. *Citizens Finance Company*, 28 NE(2) 1005, 130 ALR 890, also 53 Am. Jur. 723.

It is respectfully submitted that the Trial Court erred in refusing respondent's requested instruction.

Assignment No. II

THE TRIAL COURT ERRED IN PERMITTING THE JURY TO TAKE INTO CONSIDERATION ALLEGED DAMAGES CLAIMED TO HAVE RESULTED FROM AN ALLEGED VIOLATION OF SECTIONS 13(a) AND 13a, TITLE 15 U. S. C. A., DURING A TIME IN WHICH THE ACCUSED WAS NOT ENGAGED IN COMMERCE.

The trial court instructed the jury that in assessing damages it could take into consideration losses accruing between September 3, 1948, and the time Mr. Moore closed his shop in February of 1950.

> "In determining damages, if any, you may consider as one of the elements to be taken into consideration plaintiff's lost profits between the period of September 3, 1948, and the time when he discontinued his business in February of 1950.——" R. 231.
>
> You may further take into consideration as one of the elements of damage, if any, the extent to which the value of plaintiff's property had been diminished as the result of defendant's wrongful acts. There has been evidence as to the value of plaintiff's property on September 3, 1948, and the value on or about February 28, 1950, when plaintiff discontinued his business. The difference in this value may be considered by you as one of the factors in arriving at plaintiff's loss in his business and property." R. 231.

Respondent preserved the point in its exception to the court's charge at page 240 of the Record:

> "The Court's charge permits the assessment of damages arising from acts accruing at a time when this defendant wasn't engaged in commerce, and at a time when the purchases involved in such discrimination were not in commerce." R. 240.

The point was specifically pointed out in respondent's Motions for Judgment and New Trial. R. 20 and 33.

The stipulation at page 132 of the Record reflects that Mead's began its shipments into Farwell on December 27, 1948, nearly 4 months after the boycott and price cut started on September 3, 1948. R. 48. During the period from September 3, 1948, to December 27, 1948, no sales were made in interstate commerce.

The stipulation at page 132 of the Record also reflects that respondent had been making sales in Farwell prior to the time they first went into Santa Rosa, but deliveries there had been terminated on January 16, 1948, which was about the time Mead's went into Santa Rosa in January of 1948. The exact date is unknown; and, if it were material, the burden of proof was upon the petitioner to make such showing. In any event a showing of past purchases is insufficient. *Shaw's Inc.* v. *Wilson-Jones Co.*, 105 F(2) 331.

The absence of interstate sales does not satisfy the requirement of Section 13(a) that the "purchases involved in such discrimination" must be in commerce, nor does it fulfill the requirements of Section 13a that sales be made "in the course of such commerce." We have heretofore pointed out that petitioner's theory of liability is in full accord with this assignment, and respectfully requests that the authorities and argument under Part A, Section 12 hereof be considered hereunder.

Section 15 (Title 15 U. S. C. A.) grants a right of action for injury to business or property—

> "—by reason of anything forbidden in the anti-trust laws——."

but the alleged forbidden act, if forbidden at all, could not have been committed until the Farwell sales started. Perhaps under proper circumstances recovery could be had under the state statute; but since a thing forbidden by the Federal Act was not committed by reason of the absence

of interstate sales, the trial court erred in permitting the jury to take into consideration alleged damages claimed to have been sustained between September 3, 1948, and December 27, 1948.

The excessive verdict of the jury and the judgment of the trial court demonstrates the harm resulting from the erroneous instruction; and when viewed in the light of petitioner's evidence on the matter of damages as hereinafter discussed, the matter of the excessiveness of the verdict becomes more apparent.

It is respectfully submitted that the action of the Court of Appeals in reversing this cause is correct.

Assignment No. III

THE TRIAL COURT ERRED IN PERMITTING THE JURY TO TAKE INTO CONSIDERATION LOSS OF VALUE OF PROPERTY WHERE THE EVIDENCE SHOWS CONCLUSIVELY A GREATER MARKET VALUE AFTER THE ALLEGED UNLAWFUL ACT THAN BEFORE SAID ACT.

Petitioner sought to establish a diminished value of his bakery equipment by proof of value before and after the alleged wrongful act.

The court charged:

> "You may further take into consideration as one of the elements of damage, if any, the extent to which the value of plaintiff's property had been diminished as the result of defendant's wrongful acts. There has been evidence as to the value of plaintiff's property on September 3, 1948, and the value on or about February 28, 1950, when plaintiff discontinued his business. The difference in this value may be considered by you as one of the factors in arriving at plaintiff's loss to his business and property." R. 231.

Respondent pointed out the deficiency of the proof in his Motion for Instructed Verdict at close of petitioner's evi-

dence (R. 200), again at the close of all evidence, (R. 218) argued to the court (R. 218), in its objection to the court's charge (R. 240) and Motions for Judgment and New Trial. R. 33 and 21.

Mr. Moore testified to various purchases of second hand equipment beginning in 1940 (R. 41-2-3), and testified that his bakery was fully equipped by the end of 1947, (R. 43). He placed a value of $15,559.34 on his physical plant or equipment in 1947, and fixed his "going concern value" or goodwill at $7,500.00 in 1947. He then estimated his "going concern value" and physical plant at $23,459.34, on September 1, 1948 (R. 43, 44), but gives us no separate goodwill figure. Using his 1947 goodwill estimate would leave the physical plant or equipment value on September 1, 1948 at $15,959.34, which is not materially different from the figure given for the end of 1947. He testified that the equipment increased in value because of steel shortages and rising prices, but did not establish how much. R. 44. He offered no proof on depreciation other than to say it was "very, very little." R. 44. Mr. Moore further testified that from January 1, 1948, until the day he closed his plant, it was substantially the same. R. 211.

The petitioner then called his witness, Mr. Englehart, who said he was familiar with the values of bakery equipment (R. 159), and testified that he was in Mr. Moore's bakery in 1949 or 1950, he couldn't remember which (R. 155), but said the price war was over when he was there. R. 161. The price on bread was raised on April 26, 1949, R. 49. Mr. Englehart placed a market value of $20,000.00 on the equipment at the time he was there (R. 160), and testified that the rise in prices would "take care of the depreciation" (R. 161), and that the market value fixed by him would be the same for a year after he saw it. R. 162. The $20,000.00 value would then extend beyond the time

Mr. Moore closed his shop on February 28, 1949. R. 49. The evidence establishes no loss of value of property; therefore, the trial court erred in permitting the jury to take loss of value of property into consideration.

It is assumed that the following testimony offered by the petitioner was intended to have some bearing on the point.

Mr. Moore testified on direct examination—"it stopped in September—April 26, 1949 (speaking of the price cut) and I remained in business through '49 and until February, the last of February of 1950. Q. Then, what happened? A. I was forced to close up. Q. Was your business solvent at that time? A. Yes, sir." R. 49.

At pages 57 and 58 of the Record he testified that he had borrowed $10,000.00 from Reconstruction Finance Corporation and when he went out of business he had one Chevrolet panel truck, valued at $550.00, left over and some odds and ends and small equipment; and that a representative of Reconstruction Finance Corporation sold all the equipment mortgaged to it.

The foregoing testimony does not contradict the testimony of his witness, Englehart. Mr. Moore does not say what he received for the equipment nor does he place a value on that part not sold. The petitioner has chosen to establish his loss by proof of market value before and following the alleged wrongful acts which is the general rule governing the establishment of damages to personal property. 25 CJS at page 597. Mr. Moore called the witness, Englehart, vouched for his credibility and qualified him as an expert. He then had the witness fix a market value of $20,000.00 on the equipment that stood good for a period of one year after the time he saw it, following the "price war". R. 160-162. This valuation would expire two months or more after petitioner closed his shop on February 28, 1950. R. 49.

The only proof of value before the alleged wrong was the testimony of Mr. Moore himself and he fixed the value at $15,959.34. If the market value of the equipment depleted at any time during the year following the date Mr. Englehart saw it, the cause was not shown. Petitioner makes no charge of any illegal or wrongful act on the part of the respondent during the year following the "price war." So if there was a depression in value after the witness saw the equipment, it was the result of some cause other than the alleged acts of this respondent.

The petitioner does not contradict the testimony of his witness. All he says is that he kept some of the equipment and sold some. What he received is not shown. In any event he could not be heard to complain if he disposed of the equipment for less than its proven market value. Only Mr. Moore knows what he received and for some reason did not choose to give the jury the facts. When he put Mr. Englehart on the stand, he vouched for his credibility and offered nothing to contradict his testimony. The testimony of the witness not being inherently improbable and not shown to have been due to mistake, is binding upon the petitioner. *Jacobson* v. *Hahn*, 88 F(2) 433; *Luke* v. *United States*, 84 F(2) 711; Cert. Den.; 299 U.S. 542; 47 S. Ct. 45; 81 L. Ed. 399; *Yellow Cab Co. of Philadelphia* v. *Rodgers*, 61 F(2) 729; *Emerald Oil Company* v. *Commissioner of Internal Revenue*, 72 F(2) 681.

The petitioner's measure of damages was susceptible of proof and he proved that he suffered no loss. Any other conclusion would read into the evidence testimony that is not there.

To find the fact of damage would require a repudiation of Mr. Englehart's uncontradicted testimony and a speculation and conjecture without basis in the evidence.

The petitioner must not only establish the fact of damage

with reasonable certainty, but he must go further and furnish data and information from which his loss could be reasonably estimated or calculated. *Story Parchment Company* v. *Patterson Parchment Paper Company*, 282 U.S. 555; 51 S. Ct. 248; 75 L. Ed. 544; *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251; 66 S. Ct. 574; 90 L. Ed. 652; *Kobe, Inc.* v. *Dempsey Pump Co.*, 198 F(2) 416, Cert. Den.; 344 U.S. 837; 73 S. Ct. 46; 97 L. Ed. 651.

> "—an individual right of recovery is dependent on proof of legal injury to him, and legal injury is not automatically established by proof of a restraint of trade in violation of the Sherman Law." *Bigelow* v. *RKO Radio Pictures, Inc.* (*supra*).

The petitioner failed to establish a legal injury or damage and certainly failed to furnish data or information concerning his alleged injury to property from which a reasonable person could draw any conclusion other than the fact that the property was worth $15,959.34, before the alleged price cut and $20,000.00 for more than a year afterwards. No injury having been shown the trial court erred in submitting the instruction to the jury.

It is submitted that the Court of Appeal's reversal of the cause should be affirmed.

Assignment No. IV

THE TRIAL COURT ERRED IN PERMITTING THE JURY TO TAKE INTO CONSIDERATION ALLEGED LOSS OF PROFITS WHERE THE EVIDENCE FAILS TO ESTABLISH WITH REASONABLE CERTAINTY THAT THE COMPLAINING PARTY COULD HAVE MADE A PROFIT IN THE ABSENCE OF THE ALLEGED WRONGFUL ACT AND FAILS TO FURNISH INFORMATION FROM WHICH THE JURY COULD, WITH REASONABLE CERTAINTY, ESTIMATE THE LOSS.

The trial court erred in permitting the Jury to take into consideration lost profits in arriving at its verdict for the

reason that the petitioner did not at any time claim or make a showing that he could have made a profit on bread at any time in open and fair competition with Mead's after they came into the market in January, 1948.

The Court charged the Jury:

> "In determining damages—(R. 231) if any, you may consider as one of the elements to be taken into consideration plaintiff's lost profits between the period of September 3, 1948, and the time when he discontinued his business in February, 1959. It is simply one of the factors which you may take into consideration in arriving at a determination of the amount of damages you may find and believe from the evidence was sustained by plaintiff to his business and property" (R. 231).

At page 243 the Court gave additional instructions wherein he limited the Jury to loss of profits on bread.

The respondent pointed out the deficiency in the proof in its motion for instructed verdict at the close of petitioner's evidence:

> "The plaintiff has failed to establish any evidence to any degree of certainty that he would have made a profit on bread at any time about which complaint is here made. That the plaintiff has failed to prove by substantial evidence, nor has he proven at all that he has lost or failed to make a profit he would have made in the absence of the sale of Mead's bread at the reduced price" (R. 200).

The exception was again pointed out at the close of evidence (R. 198 and 218), argued to the court (R. 218) and again in its objection to the court charge (R. 239, 240 and 241) and motions subsequent to verdict and judgment (R. 18, 19, 33).

For the evidence on this point, we look again solely to Mr. Moore's testimony, and with his 18 years experience

let him evaluate his business before the boycott or price disturbance in Santa Rosa.

When Mead's first came into Santa Rosa in January, 1948 (R. 47), he said he concluded that there was not enough business there to support him and an out of town bakery (R. 76). He decided then that the thing to do was "get out of town" (R. 76, 82), and proceeded to rent a building in another town (R. 76). He stated repeatedly that he could not "exist" in Santa Rosa with Mead's in the market with him (R. 82, 84, 89, 212 and 213), and that he could not "make it" with them there (R. 82). He stated that he had only two alternatives "either to close down or move out" (R. 82). This conclusion was reached in January, 1948, and the price cut did not take place until 8 months later on September 3, 1948 (R. 76, 82). He agreed that during this period Mead's did not take any unfair advantage of him, and that they were legitimate business men (R. 75, 82, 89).

Q. "You knew in January after Mead's got there your business wouldn't be profitable with Mead's in town on a fair basis? A. Well, the size of the town wasn't large enough for anyone to run in. Q. But your business would not be profitable with Mead's in town on a fair basis would it? A. Well, I wouldn't confine it to Mead's. Q. Well, Mead's or anybody else in town on a fair basis. A. That wouldn't be considered fair basis when you consider the size of their operation and mine." (R. 212).

He testified that he had no loss of sales on cakes, pastries and specialty breads (R. 69). He limits his complaint to white bread and doesn't remember about wholewheat bread (R. 69, 70). The price was cut on bread alone and only in the town of Santa Rosa (R. 97, 48, 69), and he lost no sales outside the town of Santa Rosa (R. 49).

He had previously testified to a break-even point on production of bread and had stated that to "be in the black"

he had to bake "at least eight thousand loaves a week, pounds" (R. 103-4). But having gone over the production figures previously given by deposition covering months before and after the price reduction period, he very quickly disavowed his previous testimony; and stated that it "was impossible for me to tell them where I quit making money, where I started making money——" (R. 105) and admitted that by using the 8,000 pound figure, he did not make any money on bread (R. 108). At page 108, he testified "But right there where you were situated, the volume of business you had on bread produced no profit, but you did produce some profit on your pastry business, didn't you? A. Yes." At page 109—Q. "Then you don't know whether you made any money in the bread business or not, do you? A. I only know I went broke in the bread business. Q. You don't know whether you made a dime in the bread business during the years '48 and '49? A. Well, my income tax return——. Q. I didn't say that, sir. I said do you know whether or not you made any money in the bread business during the years 1948 and 1949? A. No; I made very little. Q. Did you make any profit? Do you know that to be a fact? A. I can't put my finger on a figure. Q. Then you don't know whether you made a profit or not, do you? A. Well, I have a good idea. Q. Do you know whether or not you made any profit on bread back in 1947? Well, that goes back to the question—— A. Answer my question, Mr. Moore, please. A. As I said—— Q. Answer the question please. (Objection.) A. If I answer yes or no, it makes a big difference. The court: Make any explanation you desire. A. All Right. You asked if I knew whether I made any money in 1947. Q. That's right. A. Well, the only figure I could give you would be my income tax and it shows a small profit. Q. But you don't know whether you made it in the cake business or pastry business or made it in the bread business, do you? A. I never separated them; I can't put

my finger on it. Q. You don't know, do you? A. In my own mind I know. Q. I didn't ask you that. Do you know, sir? A. *I will have to say no*" (R. 109, 110).

At page 110—"So you don't know whether you made a dime in the bread business in 1947, 1948 and 1949, do you? A. Well, I have to refer to my income tax—— Q. Answer the question, sir. A. How can I answer it when I don't have any figure to answer with?"

The Record is utterly barren of any evidence that Mr. Moore ever made a profit on bread at any time, and, in particular, in open and fair competition with respondent. The petitioner frankly admits that he makes no claim for loss of any item other than bread (R. 69). *Mr. Moore's attorney never at any time during the trial of the case even inquired into whether or not Mr. Moore ever made a profit on bread.* His inquiry concerned only profits in general and petitioner's income tax returns (R. 54, 56) which, of course, included all income and established nothing.

To recover for loss of a thing it must be shown to have at least existed. Here petitioner refused to say whether or not he made a profit on bread. He knew that his answer yes or no "made a big difference" (R. 109), but he was totally unwilling for some reason to say that he *ever* made a profit on bread. However, he is quite sure that he made no profit on bread during the eight months period he had open competition with respondent:

> Q. "And when Mead's came in there selling bread and offering bread at the same price you were offering it. A. Yes, sir. Q. Your business wasn't profitable. A. That's right." (R. 213). Q. "But right there where you were situated, the volume of business you had on bread produced no profit, but you did produce some profit on your pastry business, didn't you? A. Yes." (R. 108).

The petitioner at best says he does not know whether or not he ever made a profit on the sale of bread, but the last testimony is an admission that he did not make such a profit when Mead's appeared in the market. The measure of damages would be the difference between the profit actually realized and the profit he would have realized in the absence of the price cut (*American Crystal Sugar Co. v. Mandeville Island Farms*, 195 F(2) 622) cert. den., 343 U. S. 957; 72 S. Ct. 1052; 96 L. Ed. 1356 and we think the applicable rule is well stated by the Supreme Court of Arkansas in *United States Auto Company* v. *Arkadelphia Milling Company*, 215 S. W. 641, at page 642:

> "Uncertainty as to the amount of damage does not prevent recovery, but uncertainty as to whether any benefit or gain would have been derived at all does bar a claim for damages" (Citing numerous authorities).
>
> "However, where actual pecuniary damages are sought, there must be evidence of their existence * * *" 25 C. J. S. at page 496.

On this question Judge Brandeis in *Keogh* v. *Chicago & N. W. Ry. Co.*, 260 U. S. 156 at page 165; 43 S. Ct. 47 at page 50; 67 L. Ed. 183, had this to say:

> "These damages must be proved by facts from which their existence is logically and legally inferable."

Again in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251 at page 267; 66 S. Ct. 574 at page 580; 90 L. Ed. 652:

> "* * * an individual's right of recovery is dependent upon proof of legal injury to him, and legal injury is not automatically established by proof of a restraint of trade in violation of the Sherman law."

The fact of damage must be established with reasonable certainty. *Bigelow* v. *RKO Radio Pictures, Inc.* (*supra*);

Story Parchment Company v. *Patterson Parchment Paper Company*, 282 U. S. 555; 51 S. Ct. 248; 75 L. Ed. 544; *Telluride Power Company* v. *Williams*, 172 F(2) 673.

Only a singular conclusion can be drawn from petitioner's proof. He predicated his claim upon loss of a thing that was not in existence. It is quite obvious that if he made a profit before Mead's came, it was negligible; but it must be remembered that he was operating virtually without competition (R. 67, 74); and when called upon to operate in an equal competitive market, he admits that he could not make a profit on bread. If he suffered a loss at all, it was an operating loss and not a loss of profits which are two entirely different things. The manner of proof itself would differ materially.

It is respectfully submitted that petitioner having failed to establish with at least reasonable certainty that he would have made a profit in bread sales, in the absence of the price reduction, the trial court erred in permitting the Jury to take loss of profits into consideration in arriving at its verdict.

For a second part of this argument, we call this court's attention to the testimony of Mr. Moore at pages 71-73 of the Record, where he testified that based on his experience in the bakery business in and out of Santa Rosa, a bakery business like his located in Santa Rosa would customarily make 10 per cent. He does not limit his testimony to bread, his testimony is to a "customary" profit in the bakery business which would include cakes, pastries and other items.

If we should disregard his testimony that he did not know whether or not he made a profit (R. 105, 109, 110), that he did not make a profit on bread (R. 108, 212, 213) and other statements that certainly support the latter, and let the Jury decide the question; it must first speculate on and guess at what his profit on bread was. It certainly cannot

be reasonably estimated. To start with, the "customary" 10% is not limited to bread. Second, it is not complied or arrived at by reference to any data or information from his records or business. He explains the figure when he says, and we use his words, "That is a figure you hope with efficient operation and no interference that you *try* to arrive at" (R. 108-9). It is difficult to determine what this man means by "interference". Fair and equal competition is an "interference" to him. The ten per cent then is a goal, a par excellent so to speak, for the industry in his locality. But he does not claim to have ever made the 10 per cent; in fact in the following question, he said it was a "hoped figure" in his case (R. 108, 109). He gives us no information concerning his "efficiency" from which the jury could even speculate on how near he could have approached par. The second guess would be loss of sales.

Mr. Moore, with the help of an auditor prepared a chart or graph representing concurrent months of the year before and during the price cut which reflects that he may have lost some sales during that period only (Plaintiff Exhibit No. 1).

But we fail to find a positive statement that he lost sales after the price was raised, nor do we find any estimate or data from which such loss could be reasonably estimated. In fact, during the last 13 months of his operation he did a gross business of $74,270.00 as compared with $47,742.63 the year immediately preceding the time Mead's first came into the market with him (R. 55, 56).

It is interesting to note that on cross examination, Mr. Moore took the figures reflected by the chart and determined the difference in sales between the period of the price cut and the same period for the previous year; upon doing this it was determined that his total loss of profit was $299.72 when the "customary" ten per cent was applied to the lost gross business for the entire period of the price cut (R. 99, 100, 103).

Mr. Moore admitted twice that, assuming the ten per cent figure was correct, $299.72 was the correct amount of his loss (R. 100 again at 103).

The result was also checked against other figures previously given and the result was practically the same—$285.59 (R. 103).

With reference to any loss of sales after the price cut, the jury had no help from the petitioner, so they had to speculate on that also.

To arrive at petitioner's loss of profits under the evidence presented, the Jury had to waive aside his testimony that he did not make a profit (R. 108, 212, 213) and that he did not know whether he made a profit or not, (R. 105, 109, 110); then speculate as to what his profit was on bread, and then take a guess at what his loss of sales amounted to.

We respectfully submit that the evidence upon which the verdict was rendered was based on speculation and guess work and not data and information from which the Jury could reasonably calculate or estimate his loss, as required by the authorities. *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251; 66 S. Ct. 574; 90 L. Ed. 652; *Eastman Kodak Company of New York* v. *Southern Photo Materials Co.*, 273 U. S. 359; 47 S. Ct. 400; 71 L. Ed. 684; *DePalma* v. *Weinman*, (N. M.) 103 P. 782, 15 N. M. 68, 24 L. R. A. N. S. 423; *Kobe, Inc.* v. *Dempsey Pump Company*, 198 F(2) 416, Cert. Den.; 344 U. S. 837; 73 S. Ct. 46; 97 L. Ed. 651.

It is urged that the petitioner has failed to establish the existence of the profit he sues to recover and has failed to furnish the Jury with relevant data and information from which his loss could be reasonably estimated. It is prayed that the judgment of the Court of Appeals in reversing the trial court be affirmed.

Part C

ADDITIONAL REASONS WHY THE JUDGMENT OF THE TRIAL COURT CANNOT STAND.

I

WHERE THE COMPLAINING PARTY SEEKS TO RECOVER LOST PROFITS AND LOSS OF VALUE OF PROPERTY AND MAKES NO CLAIM OF PROOF OF OTHER DAMAGE AND FAILS TO PROVE THAT HE LOST PROFITS OR THAT THE VALUE OF HIS PROPERTY WAS DIMINISHED, HE MAY ONLY RECOVER NOMINAL DAMAGES IN AN ACTION FOR PRICE DISCRIMINATION, PROVIDED ALL OTHER ESSENTIAL ELEMENTS NECESSARY TO RECOVERY APPEAR

The petitioner based his claim for damages on (a) loss of profits and (b) loss of value of property.

The respondent has fully discussed each of these theories of recovery under Assignments III and IV, and begs leave of Court to make reference to the evidence, authorities and argument there presented in support of this Assignment.

The petitioner having elected to sue for profits but having failed to prove with reasonable certainty that he would have made a profit in the absence of the alleged discrimination, has failed to establish the fact of damage and recovery should be denied. Further, the petitioner sued for loss of value of property and sought to establish such loss by proof of market value before and following the alleged wrongful act. But, the uncontradicted evidence in the case is that the value of equipment was greater following the alleged unlawful acts than it was preceding such acts. No damage having been shown, recovery must be denied. *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251; 66 S. Ct. 574; 90 L. Ed. 652; *United States Auto Company* v. *Arkadelphia Milling Company*, 215 SW 641; *Kobe, Inc.* v. *Dempsey Pump Co.*, 198 F(2) 416 at page 425-6, Cert. *Den.*, 344 U. S. 837; 73 S. Ct. 46; 97 L. Ed. 651.

For further reason, the petitioner failed to furnish relevant data and information from which his alleged loss

of profits or loss of value of plant could be reasonably calculated or estimated and any verdict rendered would be based on mere speculation and conjecture. Having failed to discharge the burden of proof upon him, recovery should be denied. *Bigelow* v. *RKO Pictures, Inc.* (*supra*); *Kobe, Inc.* v. *Dempsey Pump Co.* (*supra*).

The respondent sought recovery for loss of profits and loss of value of property and presented no proof on any other theory of damage. Having failed in each instance to establish the fact of loss or damage and discharge the burden of proof upon him, he may only recover nominal damages, provided all other essential elements necessary to recovery have been shown.

Respondent, without waiving its position on points urged in support of the Court of Appeal's decision says that if the petitioner be entitled to any recovery it should be limited to nominal damages.

II

WHERE THE COMPLAINING PARTY IN AN ACTION FOR TREBLE DAMAGES FOR VIOLATION OF THE ROBINSON PATMAN ACT SUES TO RECOVER LOST PROFITS, LOSS OF VALUE OF PLANT, ATTORNEY FEES AND COSTS, BUT FAILS TO PROVE LOSS OF PROFITS OR LOSS OF VALUE OF PLANT, A JUDGMENT OF $19,000.00 TREBLED FOR SUCH ALLEGED LOSS IS EXCESSIVE AND AN ALLOWANCE OF $11,400.00 ATTORNEYS FEE IS UNREASONABLE AND EXCESSIVE.

The respondent has discussed at length its contention with respect to the absence of proof of the existence of profit on bread on the part of petitioner under Assignment IV and for the sake of brevity respectfully refers the court to the discussion of the evidence and authorities there discussed and requests that they be considered under this assignment.

The respondent has also set forth and discussed at length its contention with respect to the lack of proof of loss and authorities on loss of value of property under Assignment

III and for the sake of brevity respectfully requests that the same be taken into consideration under this assignment.

With the foregoing in mind special effort will be made as much as possible not to repeat or overlap the material contained in the assignments.

Without prejudicing its position in other assignments, respondent urges that the verdict of the Jury is excessive and without justification under the evidence. The price cut lasted 7 months, 23 days, and petitioner admits twice that his total loss of profit, if we use the so-called "customary" 10% profit figure, was $299.72 for the period of the price cut. R. 100-103. He also says that the figures on the chart (Plaintiff's Exhibit 1) are accurate. R. 51. Mr. Moore remained in business until February 28, 1950, (R. 49), which was 10 months and 2 days after the price on bread was raised on April 26, 1949. R. 49. He tells us that he had a sharp increase of business after the price on bread was raised on April 26, 1949, (R. 52), (See also Plaintiff's Exhibit 1), so it wou'd be reasonable to assume that the loss of gross sales on bread would have diminished after the price was increased. In fact his bread was sitting on the shelves of the 5 best stores in town without competition which was an advantage he was not entitled to but did receive. R. 93. In all the rest of the stores his bread was sitting along side Mead's. R. 94. He never did say that he lost business after the price was raised nor does he make any estimate of any business he may have lost. If he lost any at all, it was negligible; but we think the more reasonable conclusion would be that because he was holding the 5 stores alone, his volume was far greater than it would have been if things had been on a fair basis. This is indicated by the fact that during 1947 Mr. Moore had a gross volume of $47,742.63, (R. 55), but in 1949 and one

additional month in 1950, he did $74,270.53 gross business, (R. 56) which included two months of the price cut.

Assuming, for argument purposes, that he did lose some business during the remainder of the time he continued in business, he says his volume went up with the increase of price. Clearly, the loss could not have been as much for the remaining 10 months and 2 days as it was for the 7 months and 23 days of the price cut, during which period, he says his loss was $299.72. If it was as great the total amount would not have exceeded $400.00.

There is no basis for the verdict on the lost profit theory.

Now with respect to the loss of value of plant. We have pointed out that he fixed the value of $15,959.39 on his physical property on September 1, 1948, (R. 44) (Goodwill $7,500.00 subtracted from goodwill and physical value of $23,459.34 (R. 44)) and his witness, Mr. Englehart, testified that his equipment had a market value of $20,000.00 (R. 160) when he saw it after the "price war" was over, (R. 161) and that the $20,000.00 market value of equipment prevailed for a year after he saw it. R. 162. This made that market value continue for over two months after Mr. Moore closed his plant in February 28, 1950. R. 49. Mr. Englehart's testimony stands undisputed, so there is no loss of value of plant that would support the jury's findings.

Now with respect to goodwill or "going concern value." The respondent objected to the court's charge because it permitted the Jury to consider loss of goodwill in arriving at its verdict (R. 240). We have some misgivings about the effect of the charges on this. However, the only testimony on the point is that of Mr. Moore when he was talking about the value of his plant in 1947.

> Q. "What do you value goodwill? A. I consider my goodwill worth seventy-five hundred dollars." (R. 44).

He makes no explanation of how he arrived at the figure. It was given as of a time when the petitioner held 90% of the business in town (R. 67, 68), and was a concern that could exist in its market. But, Mead's came in during January of 1948 (R. 47) and the situation changed to such an extent that he had to close up or get out of town (R. 76, 82, 84). He couldn't exist with Mead's in town on a fair basis (R. 212, 82, 84, 213). We submit, a business that must close up or move out of its old place of business would have little or no going concern or goodwill value. Manifestly the changed condition rendered the value placed on his goodwill in 1947 too remote. *St. Louis I. M. & S. Ry. Co.* v. *Miller*, Sup. Ct. Ark., 154 SW 956. We have no other proof of any character on the question of goodwill, and nothing is here found to support the Jury's verdict.

We think the damage, if any were suffered, or proved at all, is a matter of computation, and that the maximum recovery would be $299.72 loss of profits. The proof with respect to loss of value of property reflects no loss and no other element of damage has been shown.

We urge that the award of the Jury is far out of proportion to the loss suffered and is a result of prejudice or mistake on the part of the Jury. We pray that the amount be reduced by this Court.

Respondent further urges that the attorney fees allowed by the court is excessive for the reason that he allows nearly as much to petitioner's attorney as was awarded by the Jury in damages. The jury awarded $19,000.00 damages and the Court without hearing any evidence on the matter, allowed $11,400.00 attorneys' fee (R. 32). An allowance of so great an attorney's fee under the circumstances presented has been held excessive and reduced in *Milwaukee Towne Corp.* v. *Leow's, Inc.*, 190 F(2) 561; cert. den., 342 U. S. 909; 72 S. Ct. 302; — L. Ed. —. It is respectfully

urged that the amount allowed as attorneys' fee is excessive and should be reduced.

Conclusion

Without waiving or prejudicing its prayer for affirmance of the decision of the Court of Appeals in reversing and directing the dismissal of petitioner's action for each of the reasons set forth in that Court's opinion and Part A of this Brief, respondent prays that the cause be reversed for new trial for each of the reasons set forth in Part B hereof; that in the alternative that petitioner's recovery be limited to nominal damages, or in the alternative that the amount of the judgment be reduced to $400.00 and that the attorneys fee allowed be reduced proportionately.

Respectfully submitted,

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